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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

Norfolk and Western Railway Company,
a Corporation,

Petitioner,

vs.

Kandythe J. Liepelt, Administratrix
of the Estate of Delroy Liepelt, Deceased,

Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

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INTRODUCTORY STATEMENT

Norfolk and Western Railway Company petitions this Court for a writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, First District, First Division.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, First Division is reported at 62 Ill.App.3d 653, and at 378 N.E.2d 1232 (1978), and is appended hereto at pages A1 to A26. The order and mandate of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal appears at pages A27-A28.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, First Division was entered on July 5, 1978. Petitioner's timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on November 30, 1978 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

It is settled that the measure of damages in state as well as federal court actions under the Federal Employers' Liability Act (FELA) is the amount that the claimant could reasonably have expected to have been applied to his benefit if the accident had not occurred. This case presents two closely related questions concerning whether a court's refusal to allow the trier of fact to consider the effect of income taxation violated this basic principle of damages:

1. Whether, in a FELA case in which income taxation would have substantially reduced the income available to a claimant if the accident had not occurred, a court may, by excluding all evidence of income taxes that the injured party would have paid on his projected lost earnings, require that damages calculations be based on the injured party's estimated *gross* income?

2. Whether, despite the likelihood that a jury would erroneously assume that a damages award is taxable, inflate its verdict to assure full compensation after payment of an imagined tax, and thus overcompensate the plaintiff, the trial court in a FELA action may refuse to advise the jury that under existing tax laws the damages award is not subject to income taxation?

STATUTES INVOLVED

35 Stat. 65, as amended, 45 U.S.C. §51.

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

26 U.S.C. §104(a)(2), Int. Rev. Code of 1954 §104(a)(2).

"Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expense) for any prior taxable year, gross income does not include — . . . (2) the amount of any damage received (whether by suit or agreement) on account of personal injuries or sickness . . . ."

STATEMENT OF THE CASE

Respondent, who is administratrix of the estate, instituted this action in an Illinois state court under the Federal Employers' Liability Act, 45 U.S.C. §51, to recover damages for the death of her decedent, Delroy Liepelt, a resident of Ohio, who had been killed in a collision at Wyatt, Indiana, in November, 1973, while working as a fireman for petitioner railway company.

At trial, respondent introduced evidence both of petitioner's negligence—which is no longer in issue—and of the monetary value of the loss she and decedent's children had incurred as a result of his death. An economist, Dr. Bernard Friedman, supplied the critical testimony on damages. Record (R) at 667-710. He stated that Liepelt, who had been earning approximately $13,000 per year at the time of his death, had had a life expectancy of a little over 34 years in 1973. Friedman further testified that, but for Liepelt's death, his annual earnings would have, under the collective bargaining agreement in effect, increased to approximately $16,800 by 1977, which was the date of the trial, and Friedman projected that Liepelt's earnings would have continued to increase at a rate of at least 5% per year for the remaining twenty-four years of his working life (R 684), thus reaching an annual salary of at least $36,000 by the time of decedent's projected retirement in the year 2000. To compute the pecuniary loss to decedent's widow and four children, Friedman aggregated these projected gross earnings, added the value of decedent's household services (which Friedman stated would be 9% of his gross income), subtracted the amounts decedent would have spent on himself (which was either 10% or 31% of his gross earnings, depending on the period of Liepelt's life), and reduced that sum to present value, arriving at a figure of $302,000. (R 684-94.)

At the close of the trial, the judge instructed the jury that each survivor's damages would be the pecuniary benefits "it might reasonably be expected each survivor would have received from the decedent, if the decedent had not met his death." (R 1425.) In making this computation, the jury was instructed to consider "what the decedent was earning and what he would have been likely to earn in the future" and also "the personal expenses of decedent and other deductions from his earnings." (R 1424.) The judge further instructed that the jury could compensate decedent's children for loss of guidance but could not award any sum for "grief or loss of society and companionship." (R 1425.) The Court refused to instruct the jury that any damages award would be nontaxable. The jury returned a verdict of $775,000.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Petitioner asserted its interrelated federal claims at every level of the Illinois court system.

At trial, prior to calling Dr. Friedman, respondent's counsel made an oral motion that petitioner be prohibited from mentioning income taxes in its cross-examination. (R 664–65; A28-A29.) When petitioner later stated its intention to cross-examine Friedman concerning the nontaxability of the award, the judge prohibited the questioning, stating that the subject of income taxation could not be referred to in the presence of the jury. (R 710–713; A29-A31.) After Friedman was excused, petitioner moved for mistrial, arguing that substantial amounts of decedent's lost earnings would have been paid in taxes and thus would have been unavailable to his beneficiaries if he had lived and that it was entitled to place before the jury evidence that an award would not be taxable. The judge, however, reaffirmed the earlier ruling that any reference to the impact of income taxation was impermis-

sible. (R 738–758; A31-A35). In light of these rulings, petitioner did not, during the presentation of its case in chief, call any witnesses on these points, but rather made an offer of proof that, but for the judge's rulings, petitioner would have called as a witness an actuary, Dr. Robert Barnes, who would have testified that state and federal taxation would have reduced petitioner's projected earnings by some $57,000 and that the pecuniary loss to decedent's survivors was either $138,327 or $115,325, depending on the rate of discounting. (R 1091-93; A35-A36.) Finally, at the close of the evidence, petitioner requested an instruction concerning the nontaxability of the award, which instruction was denied. (R 1263, RC 200; A37.)[1]

In the Illinois Appellate Court, petitioner again presented its federal claims. Petitioner's appellate brief (pp. 6, 47–61) argued that the trial court had erred by refusing to follow federal law and permit the jury to consider the impact of income taxation both on the decedent's lost earnings and on the damages award. The Illinois Appellate Court held against petitioner on both questions, stating in its opinion:

> "Defendant also claims as error the trial court's refusal to instruct the jury as to the nontaxability of a damage award; to allow cross-examination of plaintiff's economist as to the nontaxability of an award; and, to allow defendant to introduce evidence as to the effects of income taxes on the decedent's future earnings. Numerous federal cases have been cited by defendant and *amicus* American Trial Lawyers Association. From a review of these cases it is apparent that the Courts of Appeals differ on the question of whether it is proper to instruct the jury as to the nontaxability of an award or to allow evidence as to the effects of taxation on future earnings. Compare *Burlington Northern Inc.* v. *Boxberger* (9th Cir. 1975), 529 F.2d 284, with *Johnson* v. *Penrod Drilling Co.* (5th Cir. 1975), 510 F.2d 234, *cert. denied*, 423 U.S. 839.
>
> "The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that Court we will follow the decisions of our own supreme court in *Raines* v. *New York Central R.R. Co.* (1972), 51 Ill.2d 428, 430, 283 N.E.2d 230, *cert. denied* 409 U.S. 983, and *Hall* v. *Chicago & North Western Ry. Co.* (1955), 5 Ill.2d 135, 149-52, 125 N.E.2d 77, cited in *Saunders* v. *Norfolk & Western Ry. Co.* (1977), 54 Ill.App.3d 307, 316, 369 N.E.2d 518. These decisions hold that it is not error to refuse to instruct a jury as to the nontaxability of an award. Based on these decisions we also conclude that it is not error to exclude evidence of the effect of income taxes on future earnings of the decedent. These contentions are therefore rejected." (A22-A23.)

The tax questions were again raised before the Appellate Court in the Application for a Certificate of Importance filed by the petitioner with that court on August 9, 1978. When the latter was denied, petitioner filed a Petition for Leave to Appeal with the Illinois Supreme Court which stated (p. 3):

> "4. The Appellate Court erroneously refused to follow controlling decisions by federal courts which require introduction of evidence of the impact of taxation on the future earnings of a decedent, where, as was the case here, the amount of taxation would have a significant impact on net earnings.
>
> "5. The Appellate Court erroneously refused to instruct the jury that the award of damages to plaintiff is not subject to taxation."

That Petition was denied by the Illinois Supreme Court on November 30, 1978 (A27). Thus, the Illinois Court of Appeals, First Department, First Division, is the "highest court in [the] state in which decision could be had." 28 U.S.C. §1257.

[1] Petitioner also raised its two federal claims in a post-trial motion submitted to the trial court. R C261H-C261I.

REASONS FOR GRANTING THE WRIT

There are few federal questions that have so divided state and federal appellate courts as has that of the treatment of income taxation in damages computations under the Federal Employers' Liability Act. Two distinct, but related, problems have arisen.

The first pertains to the measure of lost earnings. Should these be based on estimated future *net* earnings, after deducting income taxes, or on probable future *gross* earnings? Or should the answer vary depending on the extent to which earnings were likely to have been taxed? The position of the Illinois courts is that no matter how greatly income taxation would have reduced a claimant's disposable income if there had been no accident, lost earnings are to be based on estimated *gross* earnings. The second problem, which arises because personal injury damages awards are not taxed, *see* 26 U.S.C. §104(a)(2), is whether juries should be given a cautionary instruction that the judgments are tax free. Again, the Illinois courts have held that regardless of the likelihood that a jury might erroneously assume its verdict is taxable and seek to compensate the claimant for an imagined tax, no such instruction need be given. While other courts agree with Illinois on both points, there is very substantial authority to the contrary.

Last term, this Court granted certiorari in a case which presented both these questions, and in which the lower court had agreed with the rulings of the Illinois Appellate Court, *Rediker* v. *Chicago, Rock Island and Pacific R. Co.*, 1 Kan. App.2d 581, 571 P.2d 70 (1977), *cert. granted*, 435 U.S. 922 (No. 77-1000),[2] but that case was settled by the parties and

[2]Included in the questions presented in that case (Petition for Certiorari, p. 3) was:

(footnote continued on next page)

dismissed pursuant to Supreme Court Rule 60. The same considerations that were before this Court when it granted certiorari in *Rediker* are presented by this case.

1. Federal Law Determines the Treatment of Income Taxation in FELA Damages Computations.

Over half a century ago, this Court prescribed that the measure of damages in FELA wrongful death actions is the amount the decedent's beneficiaries could reasonably have expected to have been applied to their benefit if the decedent had lived. *See Norfolk & Western Ry. Co.* v. *Holbrook*, 235 U.S. 625, 629 (1915); *Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 72–73 (1913). These holdings are but an application of the more general principle that "damages for a tort should place the injured person as nearly as possible in the position he would have occupied had the wrong not occurred." C. McCormack, Law of Damages 560 (1935). In implementing this basic federal rule of damages, this Court has required that inconsistent state court practices yield to the uniformity required by the federal act.

Chesapeake & Ohio R. Co. v. *Kelly*, 241 U.S. 485 (1916), illustrates the point. There, a state trial court had refused to instruct a jury to discount to present value an FELA claimant's lost future pecuniary benefits, and the state appellate court affirmed, apparently on the ground that such computations would be too difficult for juries. This Court reversed unanimously. Because the jury had aggregated fu-

> "[Is] the proper measure of damages for future lost wages under the provisions of the Federal Employers' Liability Act, 45 U.S.C. Sec. 1, *et seq.*, [ ] to be an amount determined without regard for the impact of federal and state income taxes on said projected future lost wages and without regard for the lack of any such impact on any verdict returned by the jury for future lost wages."

ture benefits "without taking account of the earning power of the money that [was] presently [ ] awarded," the plaintiff there had received a verdict which was greater than the "pecuniary benefits that would have resulted from the continued life of the deceased" and thus which was contrary to the purposes of damages awards under the FELA. *Id.*, at 489. To ensure that plaintiffs would not be so overcompensated, the Court held that all courts administering the FELA must instruct juries that damages based upon lost future benefits must be based on their present value only.[3]

The questions presented in this case raise the same basic issue concerning the measure of damages under the FELA as was involved in *Chesapeake & Ohio R. Co.* v. *Kelly, supra*. The issue here, stated simply, is whether the Illinois courts' rulings either impermissibly required—by excluding evidence of net earnings after taxes—and impermissibly encouraged—by refusing to give the cautionary instruction—jury verdicts which overcompensated respondent in violation of the FELA. Here, as in *Chesapeake & Ohio R. Co.* v. *Kelly, supra*, federal principles are necessarily controlling.

2. There Is a Conflict Among Both the Federal Courts of Appeals and the State Courts.

A. On the question whether income taxes should be deducted in computing damages in FELA cases, many state courts and several federal courts agree with the Illinois court

[3]This Court's treatment of the measure of FELA damages as a matter of substantive federal law is consistent with a long line of this Court's other decisions under the Federal Employers' Liability Act. *See, e.g., Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (allocation of function between judge and jury is federal question); *Bailey* v. *Central Vermont R.R.*, 319 U.S. 350 (1943) (sufficiency of evidence is federal question); *see generally* Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St.L.J. 384 (1956).

that FELA claimants (and other federal personal injury claimants) should be allowed to recover the entire amount of the projected lost gross earnings, regardless of the fact that a substantial portion of these earnings would have been paid out in taxes. *See, e.g., Boston & Maine R.R.* v. *Talbert*, 360 F.2d 286, 291 (1st Cir. 1966); *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234, 236–237 (5th Cir. 1975) (*en banc*) (Jones Act); *Chicago & N.W. Ry. Co.* v. *Curl*, 178 F.2d 497, 502 (8th Cir. 1949); *Rediker* v. *Chicago, R.I. & P.R.R., supra; McGee* v. *Burlington Northern Inc.*, Mont. , 571 P.2d 784, 790–91 (1977); *see also Varlack* v. *SWC Caribbean, Inc.*, 550 F.2d 171, 177–178 (3rd Cir. 1977) (allows deduction for taxes paid on past lost earnings but not for those paid on future lost earnings); *see generally* Annot., 63 A.L.R.2d 1393, 1398 (1959) and later cases in A.L.R.2d Supp. Service.

However, an equal number of federal courts of appeals and several state courts have rejected this view. Where, as here, such taxes would have had a substantial and significant effect on the amount of lost earnings,[4] they require a reduction for income taxation. *See, e.g., LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir. 1965), following *McWeeney* v. *New York, N.H. & H.R.R. Co.*, 282 F.2d 34 (2d Cir. 1960); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1273–74 (6th Cir. 1970) (Death on High Seas Act); *Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967) (federal maritime law); *Burlington Northern Inc.* v. *Boxberger*, 529 F.2d 284, 287–95 (9th Cir. 1975); *Sanchez* v. *Denver & Rio Grande*

[4]Here, decedent's *past* lost earnings ranged from $13,000 to $16,800 annually, and his *projected future* earnings were from $16,800 to $36,000 per year. Moreover, the excluded evidence here would have shown that taxation would have reduced decedent's lost disposable income by some $57,000 and that the net pecuniary loss therefore would have been reduced to either $138,327 or $115,325, depending upon the discount rate. See A35-A36.

W. R.R., 538 F.2d 304 (10th Cir. 1976); *Geris* v. *Burlington Northern Inc.*, 277 Or. 381, 561 P.2d 174 (1977). At least one court has further suggested that there should be a deduction for income taxes in all cases, not just those in which taxation would have a substantial effect. *See Burlington Northern Inc.* v. *Boxberger*, *supra*, at 294.

B. On the question whether juries should be given cautionary instructions concerning the nontaxability of damages awards, there is also a deep division. A number of courts take the position that the instruction is not required. *E.g.*, *McWeeney* v. *New York, N.H., & H.R.R. Co.*, *supra*, at 39; *New York Central R.R. Co.* v. *Delick*, 252 F.2d 522, 527 (6th Cir. 1958); Annot., 63 A.L.R.2d 1393, 1398 (1959) and later cases in A.L.R. Supp. Service; *see Nichols* v. *Marshall*, 486 F.2d 791, 794 (10th Cir. 1973); *Elston* v. *Shell Oil Co.*, 481 F.2d 608 (5th Cir. 1973). But at least two courts of appeals have held that because of the dangers that exist when such cautionary instructions are not given, they are required. *See Burlington Northern Inc.* v. *Boxberger*, *supra*, at 295–98; *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1248–52 (3rd Cir. 1971) (federal maritime law).

3. The Decision Below Is Contrary to Applicable Decisions of This Court and Is Erroneous.

Both aspects of the decision below are contrary to this Court's holdings in *Chesapeake & Ohio R. Co.* v. *Kelly*, *supra*, and *Norfolk & Western Ry. Co.* v. *Holbrook*, *supra*, that damages in a FELA wrongful death action is to be the amount the decedent's beneficiaries could reasonably have expected to have been applied to their benefit if the decedent had lived, *and no more*.

A. First, by excluding all evidence relating to the taxes that the decedent would have paid on the projected earnings,

the Illinois Courts assured that the damages awarded respondent were substantially more than her due. If the accident had not occurred, Liepelt plainly would have paid a substantial percentage of his gross earnings to state and federal governments in taxes. These substantial sums could never have been made available to Liepelt's beneficiaries if he had lived. However, by making gross earnings the basis for the jury calculations, the evidentiary rulings of the Illinois courts required the jury to include the amounts that would have been paid out in taxes in the damages award. These rulings thus constituted a clear violation of federal damages policy.

Although a number of justifications have been advanced in support of the Illinois courts' position, none are either persuasive on their own terms or sufficient to justify ignoring the effect of income taxation where, as here, it would have substantially reduced a decedent's disposable income. The primary objection to permitting juries to make adjustments for future tax liability is that it involves too much speculation and uncertainty. The rebuttal of Professors Harper and James is unanswerable on this point.

> "[T]he argument is weak. In the first place it has no proper application to damages for *past* losses. In measuring them the tax can be computed and should be deducted. Moreover future taxes are no more speculative than many other items that go into prophecies about future losses in this uncertain world of ours—witness the future earnings of a young child or the future trends in the dollar's value. As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as "death and taxes" the courts are avoiding their responsibilities when they decline to make the best guess they can, once all the reasonably avail-

able evidence is brought before them." II F. Harper & F. James, Law of Torts §25.12 (1956) (footnotes omitted).

A related contention is that an average jury would find calculation of tax liability unduly difficult. This argument has even less force than did the claim, rejected in *Chesapeake & Ohio Railway Co.* v. *Kelly, supra*, that the reduction of future earnings to its present value required such a difficult computation for the average juryman that it was better to overcompensate FELA claimants than to impose the task on the jury. Today's jurors have had personal experience in determining income tax liability, and with the aid of such competent expert testimony as may be received, they would find it far easier to perform that task than to, *e.g.*, make many liability determinations or perform other aspects of the required damages computation. *See Burlington Northern Inc.* v. *Boxberger, supra*, at 293.

Finally, it has been urged that failure to make adjustments for income taxation is offset by two factors jurors do not consider: future inflation and plaintiff's attorney fees. As to inflation, its effects were implicitly included in the calculation here because the jury was told that the expert's calculations included a 5% annual wage increase. As to plaintiff's attorney fees, these simply have no relevance to the measure of FELA damages. Moreover, were it an objective of our law to compensate successful parties for the expense of vindicating their rights—which it is not, absent an explicit congressional directive, *see Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)—to refuse to allow deductions for taxation would be an exceedingly clumsy means of achieving it, as the amount of fee reimbursement would depend on the decedent's tax situation.[5]

[5]An additional argument that has been advanced is that the jury's deduction of income taxes would somehow nullify congres-

(*footnote continued on next page*)

In light of these and other considerations, numerous commentators, in addition to the many courts already cited, have disapproved the gross earnings measure of damages adopted by the Illinois courts.[6] In this connection, it bears noting that, in 1955, the English House of Lords overruled its longstanding rule that the income tax consequences are irrelevant to the measure of tort damages. *See British Transport Commission* v. *Gourley*, [1956] A.C. 185.

B. Second, by refusing to require that the jury be given a cautionary instruction that the damages award is not taxable, the Illinois courts created a significant, wholly independent risk that the jury would overcompensate the beneficiaries. In a tax-conscious modern world like ours, it is probable that a jury will, in the absence of an instruction, erroneously assume that a personal injury judgment, like most other receipts of money, is taxable to the recipient. A danger clearly exists that the jury might proceed to award the plain-

sional intent to afford a tax benefit. *See Rediker* v. *Chicago, R.I. & P.R.R., supra*, 571 P.2d at 76. The only benefit Congress intended was to make lump sum damages awards—which would have been taxable in the tax year received—tax free. There simply is no basis for a claim that 26 U.S.C. §104(a)(2) or any other provision was intended to affect the measure of tort damages. Indeed, by making the aggregated lost earnings tax free, Congress invited, if it did not compel, the deduction of income taxes to ensure that the lost earnings component of a damages award would not overcompensate the plaintiff.

[6]*See* II Harper & James, Law of Torts §25.12 (1956); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St.L.J. 212 (1958); Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?, 14 DePaul L.Rev. 320 (1965); Morris & Nordstrom, Personal Injury Recoveries and the Federal Income Tax Law, 56 A.B.A.J. 274 (1960); Stripp & Rowland, Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases—Recent Developments, 36 Ins.Counsel J. 231 (1969); Note, 50 Ky.L.Rev. 601 (1962).

tiff an additional amount to compensate for an imagined tax. In the present case, there is every reason to believe that precisely this occurred. Although respondent's expert had testified that the pecuniary loss resulting from decedent's death was $302,000, the jury returned a verdict of $775,000. Respondent had, it is true, also sought damages for lost guidance to decedent's children, but it is difficult to imagine a jury awarding $573,000 for the latter, while only $302,000 for the former. The likely explanation for the verdict is that this jury settled on an award substantially less than $775,000 but, believing plaintiff would be taxed, inflated the award to ensure full "after tax" compensation.

Whether such a scenario is characterized as probable or merely as reasonably likely, what should be dispositive is that there was no reason whatsoever not to have given the cautionary instruction that would have eliminated altogether the risk of such a distortion in the size of the verdict. As numerous commentators[7] and at least two federal courts of appeals have recognized, *see Burlington Northern Inc.* v. *Boxberger, supra; Domeracki* v. *Humble Oil & Refining Co., supra*, the benefits of apprising the jury of the true tax consequences are so clear and the burden in terms of time and the possibility of confusion are so minimal that the cautionary instruction should be mandatory.

[7]See II Harper & James, Law of Torts §25.12, at 1327–28 (1956); Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell The Jury?, 14 DePaul L.Rev. 320 (1965); Feldman, Personal Injury Awards: Should Tax Exempt Status Be Ignored?, 7 Ariz. L.Rev. 272 (1965); Henderson, Some Recent Decisions on Damages: With Special Reference to Questions of Inflation and Income Taxes, 40 Ins.Council J. 423 (1973); Morris, Should Juries in Personal Injury Cases Be Instructed that Plaintiff's Recoveries Are Not Income Within the Meaning of the Federal Tax Law?, 3 Defense L.J. 3 (1958); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St.L.J. 212 (1958);

(*footnote continued on next page*)

4. The Questions Are Important.

Until recently, the question of the treatment of income taxation in measuring FELA damages was largely an academic one. In the half century following the enactment of the FELA in 1908, it was the rare case in which the resolution of these issues could have had a significant effect on the size of a claimant's judgment. Employees' wages were generally too low to be taxed, and even when subject to taxation, the amounts involved were so minimal that it produced relatively little interference with federal damages policy for courts to preclude juries from considering the impact of taxation. In the past several decades, however, these questions have acquired enormous practical importance for FELA litigants. Because wages have increased steadily, without any corresponding upward adjustment in tax schedules, nearly every wage earner now pays a substantial percentage of his income in taxes. Because the income tax is progressive, that percentage can be projected to increase with every wage increase. In consequence, in nearly every FELA case that is brought today, the questions presented in this petition have a significant and substantial effect on the exposure to liability of those employers who are subject to the Act.

It is equally clear that if, as petitioner maintains, the courts that prohibit consideration of taxation are impermissibly inflating damages awards, only a decision from this Court can afford relief. Indeed, because the FELA gives

Stripp & Rowland, Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases, Recent Developments, 36 Ins.Council J. 231 (1969); 26 Ford L.Rev. 98 (1957); 42 Geo.L.J. 149 (1953); 50 Ky.L.J. 601 (1962); 44 Ky.L.J. 384 (1956); 56 Minn.L.Rev. 503 (1972); 33 Ohio St.L.J. 972 (1973); 32 Tex.L.Rev. 108 (1953); 8 Tulsa L.J. 242 (1972); 4 U.C.L.A. L.Rev. 636 (1957); 25 U.Cin.L.Rev. 395 (1956); 9 Vand.L.Rev. 543 (1956); 11 Wash. & Lee L.Rev. 66 (1954).

plaintiffs extraordinary forum shopping opportunities,[8] which are enhanced because removal of any case is prohibited,[9] it is predictable that most major lawsuits will, until this Court acts, be tried in courts, like those of Illinois, which require the inflated verdicts.

[8]Under the Act, a plaintiff may institute suit in the district of defendant's residence, the district in which the cause of action arose, or in any district in which defendant is "doing business," and the plaintiff may sue in either state or federal court. See 45 U.S.C. §56. Because railroads typically do business in a great many states, a plaintiff may nearly always bring suit in a court where the law concerning taxation is favorable.

[9]See 28 U.S.C. §1445(a).

CONCLUSION

For the same reasons that the writ was granted in *Rediker* v. *Chicago, Rock Island and Pacific R. Co., supra*,—the conflict in the lower courts and the inconsistency of the decision below with the decisions of this Court—the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1979

APPENDICES

OPINION OF THE ILLINOIS APPELLATE COURT

FIRST DIVISION
JULY 5, 1978

77-677

KANDYTHE J. LIEPELT,
Administrator of the Estate of
DELROY LIEPELT, Deceased,
Plaintiff-Appellee,

vs.

NORFOLK AND WESTERN RAILWAY
COMPANY, a corporation,
Defendant-Appellant.

APPEAL from the Circuit Court of Cook County; the Hon. REGINALD J. HOLZER, Judge, *presiding.*

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Kandythe Liepelt (plaintiff), as administrator of the estate of her husband, Delroy Liepelt, deceased, brought this action under the Federal Employers' Liability Act to recover damages from his employer, Norfolk and Western Railway Company (defendant), for his death in the course of duty. A jury awarded plaintiff $775,000. Defendant appeals.

Defendant contends that the trial court erred: in denying defendant's motion to dismiss the action on the ground of *forum non conveniens;* in allowing the jury to consider an Indiana statute as evidence of negligence since that statute had been preempted by federal action; in directing a verdict for plaintiff on the issue of contributory negligence; in refusing its instructions on sole proximate cause; in deeming certain

facts admitted and in prohibiting the defendant from explaining those facts at trial; in refusing to allow the jury to consider the impact of federal income taxation on the issue of damages; in instructing the jury that it could award damages for loss of care and guidance for the children of the deceased when no evidence of the value of these services was presented; and that the damages are excessive.

The evidence shows that on November 22, 1973, the decedent was working as a fireman on a freight train owned and operated by the defendant. On that day, decedent was on board defendant's train, Extra 2917, travelling from Montpelier, Ohio, to Chicago. The train was made up of 140 cars and was approximately 1½ to 2 miles long. It was pulled by three diesel locomotives. The decedent rode in the cab of the lead locomotive with the engineer, Owen Perkins. The decedent sat on the left side of the cab and Perkins sat on the right. The remaining members of the crew were Macadoo Maynard and Terry Northrup, brakemen; Clayton Manly, flagman, and Roger Shepard, conductor. Maynard and Northrup rode in the second locomotive and Manly and Shepard rode in the caboose.

Defendant's rules require that whenever a third seat is available in the lead locomotive a brakeman is required to ride there. One of his duties is to act as an additional lookout. There was no third seat available in the lead locomotive of Extra 2917. Decedent and the engineer were alone in the cab.

The entire train had been inspected by defendant's personnel before it left Montpelier. It was found to be in good condition. However, there is testimony that all three diesel locomotives "were old and worn out." The diesel engines operate an air compressor which supplies air pressure to

operate the brakes. At the head of the train the pressure was approximately 75 pounds. At the rear of the train the pressure dropped off. A minimum of 60 pounds is required throughout the train for the brakes to operate effectively. Shortly prior to the occurrence Perkins, the engineer, had radioed the caboose concerning "trouble with the air."

Each locomotive has two 200-watt headlights. The beams from these lights must be capable of illuminating the image of a man at least 800 feet in front of the train. There is evidence that the fireman, as well as the engineer, has a duty to keep a lookout as the train proceeds. Levers for applying the brakes are at the right of the cab in front of the engineer. The fireman also has an emergency brake lever on his side of the cab.

The track on which Extra 2917 travelled is a single, main line, maintained and operated by the defendant. In order for two trains travelling in opposite directions to pass each other it is necessary for one of them to enter a parallel track, called a "siding" or "passing track." The train on the passing track is obliged to wait until the other train has passed before re-entering the main track. Entry to these sidings is made possible by a switch at either end of the siding. The switch must be opened manually to permit entry to the siding from the main track.

Between Montpelier and Chicago one such siding is located near Wyatt, Indiana. This siding runs east/west for approximately 4000 feet. It is immediately to the south of the main line track. In addition to being used as a passing track, this siding is connected to an auxiliary track called a "spur." This spur runs adjacent to a grain elevator, enabling grain cars (hopper cars) to be positioned directly under the elevator for loading.

The defendant's rules prohibit the storing of cars on a siding unless "authorized by the superintendent or in emergency. When so obstructed, the train dispatcher must be notified." On November 22, 1973, the siding at Wyatt contained seven loaded hopper cars weighing 690 tons. No authorization had been issued and no emergency existed. The defendant's dispatcher in Montpelier stated that he was aware the Wyatt siding was used to store loaded hopper cars during the busy season. The cars were positioned so that their eastern most end was 198 feet west of the east switch. Thus, there were 198 feet of track separating the east end of these parked hopper cars and the main track.

All switches are equipped with a position indicator or banner from which the train operators can determine whether the switch is open or closed. The testimony concerning the number of banners employed on the east switch at Wyatt is somewhat contradictory. However, it appears from the exhibits and the testimony of Maynard, a brakeman, that the signal consisted of two aluminum banners positioned one above the other on a pole over the switch. The top banner was oblong, 15½ inches wide and 6 inches high. It was covered with red reflectorized paint and stood approximately 7 to 9 feet in the air. The lower banner was 15 inches square and was also red, though not reflectorized.

Both banners faced in the same direction. When the switch was closed the banners would be parallel to the main track and therefore not visible to trains approaching on that track. When the switch was open the banners would turn to face trains approaching from the east. A red signal, therefore, indicated that the switch was open.

There was testimony that the banners on the east switch were dirty from smoke and dust. Maynard testified that he

visited the site of the occurrence "a couple of days" thereafter. The banners were "really dirty" and, in daylight, they could hardly be seen from a distance of 700 feet. The banners had also been partially damaged, apparently by shotgun blasts. Northrup, a brakeman, testified that there were high weeds and brush in the area which made the switch position indicators "hard to see."

The switch itself was padlocked. The lock could not be located the night of the occurrence but was found the following day in a ditch adjoining the track. The lock was jammed in a partially open position and bore marks of an attempt to force it open. The switch itself had been opened and the red banners were facing the westbound traffic. A witness for the defendant testified that he had operated the switch some 3 days prior to the occurrence and found both the lock and the switch to be in good working order. He had locked the switch after its use.

The track in the immediate area of the occurrence was described by witnesses as "rough" and "run down." The ties "were in bad condition" and "many or most" of them were "old, rotten, splitting and cracked." Many spikes were loose. The ballast, which is made up of crushed stone and covers the ties, was in poor condition causing the train to rock "severely" from side-to-side. The speed limit on this stretch of track had been reduced from 50 to 40 miles per hour.

Defendant's track supervisor testified that he inspected the track the day after the occurrence and took no exception to the condition of the track or the visibility of the signal. A brakeman employed by defendant stated that he found no vegetation in the area of the switch when he operated it 3 days prior to the occurrence.

As Extra 2917 approached the Wyatt siding, it was travelling at approximately 32–37 miles per hour. It was early evening, between 5:30 and 6 p.m. There was little light except for a faint glow in the western sky. Terry Northrup, a brakeman, testified that he heard the brakes go into emergency operation. He saw the first locomotive veer sharply to the left and then saw 7 or 8 hopper cars directly in front of it. There was a terrible crash. At the moment of impact the train was travelling at approximately 30 miles per hour. The first hopper car was forced on top of the lead locomotive, shearing the cab. The decedent and the engineer were killed instantly.

The trial court denied defendant's motion to dismiss based upon *forum non conveniens*. Defendant is a Virginia corporation with its principal office in that state. It conducts business in Illinois only as a part of its line running from various points in Ohio to Chicago. The decedent lived in Ohio and his estate is being probated there. The occurrence took place near Wyatt, Indiana, some 90 miles from Chicago.

Defendant's motion was properly supported by affidavit. The affidavit showed that the proposed witnesses lived in Ohio, Indiana, Michigan or Virginia. No occurrence witnesses lived in Illinois. Defendant shows in its brief that 21 witnesses testified of which only 2 lived in Illinois. All other witnesses were obliged to travel to Chicago.

Plaintiff filed an answer to the motion attacking its sufficiency and asserting her right to choice of forum and to trial counsel practicing there. Briefs were filed in the trial court by both sides.

In our opinion, this issue is decided by *Saunders v. Norfolk & Western Ry. Co.* (1977), 54 Ill. App. 3d 307, 369 N.E. 2d 518. That case presents many facts which coincide with the

situation at bar and the doctrine of *forum non conveniens* is given comprehensive treatment. (*Saunders*, 54 Ill. App. 3d 307, 309-12.) It is unnecessary for us to repeat the principles and authorities noted there.

It is sufficient for us to note that although the states have power to apply the doctrine of *forum non conveniens* to actions arising under the Federal Employers' Liability Act, there are strong considerations of policy which confer on plaintiffs in these cases the right and privilege to choose any forum in which the defendant railway is doing business. Furthermore, "[t]he trial court's decision on the motion will be overturned only if the reviewing court finds an abuse of discretion." *Saunders*, 54 Ill. App. 3d 307, 311.

Attempting to weigh and balance all of the factors on both sides, we conclude that the trial court did not abuse its discretion in denying the motion. This result is supported by a review of the record in this case. Able counsel for the defendant presented a spirited and thorough defense. We cannot find any evidence of handicaps or problems arising which hampered the defense because of the choice of forum. We approve the ruling of the trial court in this regard.

The second issue raised by defendant concerns the doctrine of federal preemption. (U.S. Const., art. VI , cl. 2.) At the time of this occurrence, section 1 of the Indiana Switch Light Act (Ind. Code § 8-8-10-1 (Burns 1976) (amended 1977, P.L. 106, § 2)), read:

> "Every steam railroad company operating wholly or partly in the state of Indiana shall place and maintain upon each switch in said state that is connected with the main track a signal light, attached in such manner to the moving panel of such switch that it will indicate safety when such switch is set to such main track, and that will indicate danger when such switch is not set to the main

track. Said light shall be kept brightly burning constantly between the hours of sunset and sunrise, and on such days or parts of days as are dark and foggy."

At trial, plaintiff was allowed to introduce the existence of the Switch Light Act over defendant's objection. Also, as we will later discuss, the trial court included this Act in one of the jury instructions.

In 1970, Congress passed the Federal Railroad Safety Act (45 U.S.C. §§ 421-441 (1972)) (FRSA). Under the FRSA the Secretary of Transportation (Secretary) is authorized to promulgate rules, regulations and standards for all areas of railroad safety. (45 U.S.C. § 431 (1972).) Section 205 of the FRSA (45 U.S.C. § 434 (1972)), concerns the preemption of state laws. That section reads:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

The Secretary adopted a series of rules on track safety standards. (49 C.F.R. § 213 (1976).) Standard 213.135 is entitled "Switches." It contains performance standards for eight distinct aspects of a switch. Subpart (g) of Standard 213.135 states, "[e]ach switch position indicator must be clearly visible at all times." There is no specification of the type of indicator that is to be used.

The doctrine of preemption has been the subject of two recent United States Supreme Court decision. (*Ray v. Atlantic Richfield Co.* (1978), U.S. , 55 L. Ed. 2d 179, 98 S. Ct. 988; *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 51 L. Ed. 2d 604, 97 S. Ct. 1305.) In both of these cases the court began its analysis of the preemption issue " 'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " (*Ray*, 98 S. Ct. 988, 994; *Jones*, 430 U.S. 519, 525, both quoting from *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed 1447, 67 S. Ct. 1146.) In *Ray*, the court further stated that the Congressional purpose may be evidenced in a number of ways, one being where the " 'scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " (98 S. Ct. 988, 994, quoting from *Rice*, 331 U.S. 218, 230.) Both *Ray* and *Jones* point out that even where a particular area is not totally foreclosed to the States, no state law may stand where it would be impossible to comply with both the state and federal regulations or where the state law would frustrate the Congressional purpose. *Ray*, 98 S. Ct. 988, 994, *Jones*, 430 U.S. 519, 525-26.

In the present case we are faced with the explicit declaration of Congress that no state rail safety law shall remain valid after promulgation of a federal regulation covering the same subject matter as that covered by the state law. (45 U.S.C. § 434 (1972).) The limited exception for purely local safety hazards has not been claimed to apply to the Indiana statute. Therefore, the narrow question with which we are faced is whether the Switch Light Act and Standard 213.135(g) cover the same subject matter.

On its face Standard 213.135(g) simply imposes a general requirement of visibility for switch position indicators. It

does not specify the type of indicator that must be used nor does it indicate any design specifications that must be followed.

Thus, in many respects this case is similar to *Chrysler Corp. v. Tofany* (2d Cir. 1969), 419 F.2d 499. That case concerned the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. §§ 1381–1431 (1972) (Traffic Safety Act)), and Federal Motor Vehicle Safety Standard No. 108 (49 C.F.R. § 371.21 (1969)).[1] Paragraph S3.1.2[2] of Standard 108 provided that "[n]o additional lamp,***shall be installed [on an automobile] if it impairs the effectiveness of the required equipment."

In 1969, Chrysler sought to introduce an additional headlamp, which it called "Super Lite", as optional equipment on certain models of its Dodge line of automobiles. Prior to doing so it had obtained assurance from the National Highway Safety Bureau that the addition of Super Lite did not violate Standard 108. Officials of the States of New York and Vermont, however, sought to prevent the sale in their States of Dodge automobiles equipped with Super Lite. Chrysler objected on the ground that section 103(d) of the Traffic Safety Act (15 U.S.C. § 1392(d) (1972)), precluded all states from enacting auto safety standards which were not identical to existing federal standards covering the same "aspect of performance." Chrysler argued that Standard 108, paragraph S3.1.2 covered the same aspect of performance as the officials of New York and Vermont wished to regulate. Chrysler also argued that the Congressional objective sought to be attained by the passage of the Traffic Safety Act was national

[1]Standard No. 108 has been recodified and amended as 49 C.F.R. § 571.108 (1976).

[2]Paragraph S3.1.2 has been redesignated and amended as paragraph S4.1.3 (1976).

uniformity of auto safety standards and that this objective would be defeated by allowing New York and Vermont to set their own standards in regard to Super Lite.

The Second Circuit held that the purpose of the Traffic Safety Act was to promote highway safety and that nationally uniform safety standards were a means to that end rather than the end itself. (*Tofany*, 419 F.2d 499, 508.) The court felt the need to construe the aspect of performance clause narrowly so as to provide states the opportunity to regulate new products that might be placed on the market before the federal agency had time to certify their safety. The court therefore concluded that paragraph S3.1.2 of Standard 108 covered a different aspect of performance than the standards of New York and Vermont. Accordingly the court held that the state regulations were not preempted by the Traffic Safety Act. *Tofany*, 419 F.2d 499, 511.

Similar reasoning can be applied to the facts before us. Section 101 of the FRSA declares the purpose of that Act to be: "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons***." (45 U.S.C. § 421 (1972).) Although Congress was also concerned with national uniformity of railroad safety standards, the primary legislative concern was safety. In the case before us, as in *Tofany*, a narrow construction of the coverage of the preemption provision will aid in achieving safety by enabling the States to continue in force regulations covering aspects of rail safety not yet covered by the Secretary's regulations.

Standard 213.135(g), the federal regulation before us, is concerned only with visibility, while the Switch Light Act covers indicator design. The Secretary, while authorized to go further in his regulation of rail switches, has chosen not to

do so. There may come a time when the Secretary will choose to enact detailed specifications on all aspects of rail switches in which event the state laws on this subject must give way. "But it will be time to consider such asserted conflicts between the State and Federal Acts when and if they arise. Any such objections are at this stage premature." *Rice*, 331 U.S. 218, 237.

Considerations of time and space make it impossible for us to comment upon each of the many authorities cited on this issue by defendant and the *amici* Railroads. We will, however, comment upon the authorities which we regard as those upon which greatest reliance is placed.

Donelon v. New Orleans Terminal Co. (5th Cir. 1973), 474 F.2d 1108, *cert. denied*, 414 U.S. 855, concerned an attempt by local parish officials to regulate railroad safety. The finding of preemption in that case was limited to preemption of *local* government regulation. The question of the preemptive effect of the FRSA on state legislation was expressly reserved. 474 F.2d 1108, 1113.

National Association of Regulatory Utility Commissioners v. Coleman (3d Cir. 1976), 542 F.2d 11, involved the standards for reporting railroad accidents. (49 C.F.R. § 225 (1976).) The court held that the States were preempted from adopting their own reporting systems. There, however, the federal standards were very specific in their requirements, unlike the general federal standard on switches involved here. In addition, the Secretary expressly stated in Standard 225.1 of the accident reporting standards that the issuance of the federal reporting requirements "preempts States from prescribing accident/incident reporting requirements." (49 C.F.R. § 225.1 (1976).) The absence of any corresponding language in the Track Safety Standards indicates that the Secretary

recognized that these standards did not cover all possible aspects of track safety.

This is further evidenced by Track Safety Standard 213.1 which states that this section contains initial minimum standards covering isolated track conditions. "[A] combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track." (49 C.F.R. § 213.1 (1976).) This language indicates to us that the Secretary not only contemplated but encouraged remedial state action in certain areas of rail safety.

We conclude, therefore, that Standard 213.135(g) does not cover the same subject matter as covered by the Switch Light Act and that the latter was not preempted by the former. Consequently, the trial court committed no error in receiving evidence of the Switch Light Act.

Defendant also contends that the trial court erred in reading section 3 of the Switch Light Act to the jury. Section 3 provided for liability for violation of the Act (Ind. Code § 8-8-10-3 (Burns 1976) (repealed 1977, P.L. 106, § 3)):

> "For any violation of or failure to comply with any of the provisions of this act such company shall be liable to all persons and employees injured by reason thereof, and no employee shall, in any case be held to have assumed the risk incurred by reason of such violation or failure."

The defendant contends that this was error in that the FELA preempts section 3 of the Switch Light Act. It cites *Seaboard Air Line Ry. v. Horton* (1914), 233 U.S. 492, 58 L. Ed. 1062, 34 S. Ct. 635, in support thereof.

Also, the trial court instructed the jury that if it found the defendant "violated the [Act] on the occasion in question,

then [it could] consider that fact together with all the other facts and circumstances in evidence in determining whether or not [the defendant] was negligent before and at the time of the occurrence." (From Illinois Pattern Jury Instructions, Civil, No. 60.01 (2d ed. 1971) (hereinafter cited as IPI Civil).) The defendant claims, citing *Northern Trust Co. v. Chicago Rys. Co.* (1925), 318 Ill. 402, 149 N.E. 422, that it was reversible error to read the preempted portion of the statute to the jury coupled with an instruction that the jury could consider the void statute as a basis for liability.

We agree with defendant that the FELA has preempted the liability portion of the Switch Light Act. However, in our opinion, the defendant's reliance on *Northern Trust* is misplaced. That case held that it was reversible error to cite a void statute to the jury coupled with a peremptory instruction. (318 Ill. 402, 414.) A peremptory instruction is one "given by a court to a jury, which the latter must obey implicitly, as an instruction to return a verdict for the defendant, or for the plaintiff, as the case may be." (*Martin v. Kralis Poultry Co.* (1973), 12 Ill. App. 3d 453, 466–67, 297 N.E.2d 610.) In the present case, no peremptory instruction was given on this point. The judge merely instructed the jury that it might consider section 3 along with "all the other facts and circumstances in evidence in determining whether or not [the defendant] was negligent***." IPI Civil No. 60.01.

Furthermore, it is evident from the pleadings that the plaintiff brought her action under the FELA. The trial judge instructed the jury on the issue of liability by reading to them the Illinois Pattern Instruction on liability in FELA cases. (IPI Civil No. 160.02.) We do not believe that by reading section 3 to the jury the trial judge erroneously led the jury to believe that liability could be based on that section

rather than on the FELA. Therefore, even if it was error to cite the preempted section of the statute to the jury, the error was harmless.

The next point raised by defendant concerns the trial court's action in directing a verdict for plaintiff on the issue of contributory negligence. Under the FELA a finding of contributory negligence does not bar recovery as it would in an ordinary negligence action. If the jury makes a finding of contributory negligence, it is required to reduce the damages in proportion to the degree of negligence attributable to the injured party. (45 U.S.C. § 53 (1972).) Also, under the FELA, the burden of establishing contributory negligence is on the defendant. (*Fisher v. Chicago, Rock Island & Pacific Ry. Co.* (1919), 290 Ill. 49, 56, 124 N.E. 831.) "In FELA cases there is a presumption that the deceased was engaged in the performance of his duty and exercised due care for his own safety at the time of his death." *Moore v. Atchison, Topeka and Santa Fe Ry. Co.* (1960), 28 Ill. App. 2d 340, 355, 171 N.E.2d 393.

The evidence relied on by the defendant to show contributory negligence consists of the results obtained from a reenactment of the accident conducted 6 days later by employees of the defendant. The results of these tests were made the subject of requests for admissions which plaintiff served on defendant. The tests showed:

(1) At a point 2,879 feet east of the east end switch the reflectorized banner was barely visible;

(2) At a point 1,777 feet east of the east end switch the reflectorized banner was distinctly visible;

(3) At a point 966 feet east of the east end switch, in the opinion of the observers, the engineer of Extra 2917 would have realized something was definitely wrong and would have placed the train brakes in emergency;

(4) Under normal conditions, Extra 2917 would have been stopped by emergency application of the air brakes in 1,478 feet;

(5) The loaded hopper cars were parked on the siding 198 feet west of the east switch;

(6) The brakes of Extra 2917 were not applied until 569 feet east of the switch.

The defendant also points to evidence that the decedent had a duty to maintain a lookout and to apply the emergency brakes if necessary. One of the emergency brake levers was located on decedent's side of the cab.

The trial judge, however, had much more evidence to consider in deciding this issue. There was testimony by the flagman, Clayton Manly, that the track near Wyatt was "rough and not [in] too good a shape." Terry Northrup, a brakeman, testified that this condition caused a rocking motion and made braking more difficult than on a smooth, well-kept roadbed. Clayton Manly further stated that 15 or 20 minutes prior to the accident the engineer called him and complained of "having trouble with the air." This condition would also affect the braking ability of the train.

Also there was testimony by at least two witnesses that the banners on the switch were dirty from dust and smoke and there were high weeds and bushes near the switch which made the banners difficult to see. Furthermore, the decedent was not primarily responsible for keeping a lookout. As a fireman he was required to keep a lookout only when he was not preoccupied with other duties. It was the engineer who was primarily responsible for operating the train. The decedent had a right to rely on proper performance of this duty by the engineer particularly while the decedent was occupied with his other duties. *Knierim v. Erie Lackawanna R.R. Co.* (2d Cir. 1970), 424 F.2d 745, 747.

In *Taylor v. Atchison, Topeka and Santa Fe Ry. Co.* (1937), 292 Ill. App. 457, 465–66, 11 N.E.2d 610, *cert. denied*, 304 U.S. 560, the court stated:

> "The fireman is merely an assistant acting under the direction of the engineer, and from the character of his duties in keeping up steam by firing, it cannot be said that it is his paramount duty to be on the lookout all the time. As was said in *St. Louis & S. F. R. Co. v. Bishard*, 147 Fed. 496, 'other duties of moment may have demanded his attention elsewhere.' "

Fireman are no longer required to shovel coal to maintain steam, but there are other duties which demand their attention. Terry Northrup testified that about an hour before the accident the decedent left the lead locomotive to inspect the electrical systems of the second and third locomotives. Northrup stated that there was an inadequate amount of electricity to power the drive wheels and that the cab and instrument lights were dim. Decedent made an effort to correct this situation but, according to Northrup, the condition persisted up to the time of the accident. In addition to the electrical problem, there was testimony from Clayton Manly, flagman in the caboose, that the engineer contacted him concerning trouble with the air pressure about 15 to 20 minutes prior to the accident.

Viewing the evidence as a whole, it is impossible to determine exactly what the decedent was doing immediately prior to the accident. However, the evidence strongly suggests that the decedent was occupied with at least two mechanical problems and was therefore unable to maintain a lookout. The defendant did not carry its burden of presenting any evidence to negate this inference and therefore any contrary conclusion would necessarily be pure speculation and conjecture. A finding of negligence cannot be based on such tenuous grounds. (*Tompkins v. Twin Oaks Dairy, Inc.* (1968), 91

Ill. App. 2d 88, 94, 234 N.E.2d 403, *leave to appeal denied*, 38 Ill. 2d 630.) Reviewing all of the evidence presented we conclude the trial court was correct in directing a verdict on the issue of contributory negligence.

Defendant raises an issue on refusal of the trial court to give defendant's tendered instruction on proximate cause. Defendant tendered IPI Civil No. 12.04 which states:

> "More than one person may be to blame for causing an injury. If you decide that the defendant was negligent and that his negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.
>
> "[However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.]"

The trial court rejected this instruction and gave plaintiff's version of No. 12.04 which omitted the bracketed language. The defendant claims that the trial court thus precluded it from having the jury instructed on one of its theories of the case, namely that the sole cause of the accident was the conduct of some third person who broke the switch lock and threw the switch.

The Notes on Use accompanying IPI Civil No. 12.04 state that the bracketed language "should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was the conduct of a third person."

Even if we assume *arguendo* that there was sufficient evidence to show that an unrelated third party broke the lock and tampered with the switch, the defendant still could

not claim that this was the sole proximate cause of the accident. Defendant parked seven loaded hopper cars on the Wyatt siding in violation of its own rules and failed to notify the crew of Extra 2917 of this fact. Thus, despite other evidence adduced by plaintiff regarding other possible proximate causation, the evidence shows that if the hopper cars had not been parked on the siding the mishap would not have occurred. The defendant's conduct in failing to keep the siding clear of obstruction and in failing to notify the crew of Extra 2917 of the obstruction created reasonably foreseeable dangers. The record demonstrates that the intervening act of a third party was not the sole cause of the accident. (See *Drell v. American National Bank & Trust Co.* (1965), 57 Ill. App. 2d 129, 139, 207 N.E.2d 101.) The jury was properly instructed in this regard.

Defendant next urges error in the trial court in ruling that the plaintiff's requests to admit certain matters were deemed admitted because of defendant's improper responses. Prior to trial, on December 1, 1975, the plaintiff served upon defendant a request for admissions of certain facts pursuant to Supreme Court Rule 216. (Ill. Rev. Stat. 1975, ch. 110A, par. 216.) The facts sought to be admitted were those obtained by the defendant as a result of its investigation of the accident. An investigation was also conducted by the Federal Railroad Safety Board (FRSB) and certain of the facts sought to be admitted were contained in the FRSB report.

The plaintiff moved to strike the defendant's initial responses because they did not contain the detailed answers required by Rule 216(c). (Ill. Rev. Stat. 1975, ch. 110A, par. 216(c).) The defendant withdrew these responses and filed a second set on March 15, 1976. Nothing further was done concerning these responses until November 16, 1976, the second day of trial, at which time the trial court granted plaintiff's

motion to declare the matters contained in five of the requests as admitted by defendant because of defendant's failure to give proper responses.

Rule 216(c) provides in part:

> "Each of the matters of fact***of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part."

The defendant did not deny or object to the plaintiff's requests, therefore it was incumbent upon defendant to set forth in detail the reasons it could not admit or deny the matters. This it failed to do.

In *Banks v. United Insurance Co. of America* (1975), 28 Ill. App. 3d 60, 328 N.E.2d 167, this court stated that "[u]nless the party, to whom a notice to admit is directed, conforms his response to the framework provided by the Rule,***" the requested matters are admitted.

In the case before us, the defendant began its investigation immediately after the accident occurred, almost 3 years prior to trial. Its employees had performed numerous observation tests the results of which were readily available to it. Yet in spite of this the defendant continued to maintain at all material times that it could not admit these matters because its investigation was not completed.

Actually, the facts sought consisted of basic measurements, weights, braking distances, equipment used and results of the observation tests. The defendant's response to each of these requests was that its investigation was not complete and therefore it had "insufficient information to admit or deny the facts set forth***." The contention that these matters were not in the defendant's knowledge is incomprehensible. One of the requests asked the defendant to admit the stopping distance of Extra 2917 which fact had been stated in the FRSB report. Another request sought the admission of the results of defendant's observation tests which were also contained in the FRSB report. Still another request asked the defendant to admit that it did not have a derail device on the passing track at Wyatt. Each of these facts was within the defendant's knowledge.

We conclude that the defendant failed to conform its responses to Rule 216(c) and therefore the requested matters were properly admitted.

In its brief, defendant urges that the court erred in excluding additional testimony from Charles Bagby, defendant's engineer who had conducted the tests above described. The first point raised is an attempt to modify the distance stated in the tests above described as to the point at which the emergency brakes of the train should have been applied. As above shown, this was an improper attempt by defendant to modify its response to the admissions of fact. (*West Central Utilities Service Co. v. Central Illinois Public Service Co.* (1976), 42 Ill. App. 3d 5, 355 N.E.2d 349, *leave to appeal denied*, 65 Ill. 2d 580.) Secondly, defendant urges in its brief that the court erred in excluding evidence by the engineer regarding the distance from the point of impact at which the normal braking capacity of the engine should have been exerted. However, without considering the importance of this point, if

any, we reject this contention. The record shows that defendant made no offer of proof in this regard. We find no indication in this record that the court would have prevented the engineer from testifying about this matter. The court simply excluded testimony from the witness regarding matters already admitted. Thus, the question sought to be raised by defendant regarding application of the ordinary brakes was never presented to the witness or to the court.

Defendant also claims as error the trial court's refusal to instruct the jury as to the nontaxability of a damage award; to allow cross-examination of plaintiff's economist as to the nontaxability of an award; and, to allow defendant to introduce evidence as to the effects of income taxes on the decedent's future earnings. Numerous federal cases have been cited by defendant and *amicus* American Trial Lawyers Association. From a review of these cases it is apparent that the Courts of Appeals differ on the question of whether it is proper to instruct the jury as to the nontaxability of an award or to allow evidence as to the effects of taxation on future earnings. Compare *Burlington Northern, Inc. v. Boxberger* (9th Cir. 1975), 529 F.2d 284, *with Johnson v. Penrod Drilling Co.* (5th Cir. 1975), 510 F.2d 234, *cert. denied*, 423 U.S. 839.

The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that Court we will follow the decisions of our own supreme court in *Raines v. New York Central R.R. Co.* (1972), 51 Ill. 2d 428, 430, 283 N.E.2d 230, *cert. denied*, 409 U.S. 983, and *Hall v. Chicago & North Western Ry. Co.* (1955), 5 Ill. 2d 135, 149–52, 125 N.E.2d 77, cited in *Saunders v. Norfolk & Western Ry. Co.* (1977), 54 Ill. App. 3d 307, 316, 369 N.E.2d 518. These decisions hold that it is not error to refuse to instruct a jury as to the nontaxability of an award. Based on these decisions we also conclude that it is not error to exclude evidence of the

effect of income taxes on future earnings of the decedent. These contentions are therefore rejected.

We next turn to the issues raised by defendant concerning damages. The decedent is survived by his wife and four minor children, two of whom are from a previous marriage. These latter two are twin girls and were 16 years old at the time of the occurrence. The remaining two children are both boys, one 3 years old and the other 4½ months old at the time of decedent's death.

The decedent was 37 years old and was earning approximately $13,000 per year. Increases would have raised his earnings to about $16,800 per year by 1977. The plaintiff's economist fixed the present value of the future loss to the decedent's family at $302,000. He used a life expectancy of roughly 34 years for the decedent. The economist was unable to value the elements of rearing, training, instruction, advice and guidance of the decedent's children. He knew of no statistics for placing a monetary value upon these elements.

The defendant claims that it was error for the trial court to instruct the jury that it could award damages for the pecuniary value of any loss to the children of "care, attention, instruction, training, advice and guidance" (IPI Civil No. 160.15), when no evidence of the value of such factors had been introduced. The defendant cites only one case in support of this proposition, *Petition of United States Steel Corp.* (6th Cir. 1970), 436 F.2d 1256, *cert. denied*, 402 U.S. 987. That case, however, was not concerned with the amount of evidence produced. The question there was whether *any* award for loss of guidance could be granted to the wives and adult children of the decedents. In that sense it is distinguishable from the case at hand.

The law in Illinois as to the sufficiency of the evidence to support an award for care and guidance is stated in *Allendorf v. Elgin, Joliet and Eastern Ry. Co.* (1956), 8 Ill. 2d 164, 180, 133 N.E.2d 288, *cert. denied*, 352 U.S. 833:

> "***we are of the opinion that it is unnecessary to undertake to prove the value of the financial loss of such care, etc., any more than it would be necessary to prove the value of pain and suffering or of inconvenience and annoyance when they are elements of damages. The jury should assess the value of such loss in the exercise of their best judgment based upon the facts of each case."

This decision has been followed in this court. *Lambdin v. Walter* (1968), 91 Ill. App. 2d 273, 233 N.E.2d 435; *Dodson v. Richter* (1962), 34 Ill. App. 2d 22, 180 N.E.2d 505.

The jury was presented with ample evidence of the care and guidance rendered by the decedent to his children prior to his death. There was evidence that the decedent was a family man who neither drank nor gambled. The record contains numerous references to his relation to his family. These indicate that the decedent spent a great part of his free time helping around the house and teaching the children needed skills. In addition, since the survivors of the decedent are his lineal kinsmen, a "presumption of pecuniary loss obtains from the relationship, alone, sufficient to sustain a verdict and judgment awarding substantial damages, without proof of actual loss." (*Baird v. Chicago, Burlington & Quincy R.R. Co.* (1976), 63 Ill. 2d 463, 471, 349 N.E.2d 413, quoting from *Howlett v. Doglio* (1949), 402 Ill. 311, 316, 83 N.E.2d 708.) The trial court properly left the determination of the value of these services to the jury.

The defendant's final assignment of error concerns the size of the award. The defendant claims that $775,000 is excessive in light of the testimony by plaintiff's economist that the

present value of the decedent's lost earnings only amounted to $302,000. We do not agree.

The Illinois Supreme Court has stated that the "amount of damages to be assessed is peculiarly a question of fact for the jury, and if the jury was properly instructed on the measure of damages, a reviewing court should not substitute its judgment for that of the jury as to the sum to be awarded." (*Baird*, 63 Ill. 2d 463, 472-73.) A reviewing court must "carefully scrutinize the record to determine [if the award] is so large as to indicate passion and prejudice." *Baird*, 63 Ill. 2d 463, 473.

As above stated, we believe the jury was properly instructed on the issue of damages, therefore our only task is to review the record to determine if the award was the result of passion and prejudice. After a thorough review of the record we do not believe it was.

Plaintiff's economist testified that he based the computation of lost earnings on a "conservative" estimate of future increases in the decedent's salary. Also, the projection by the economist did not include any amount for the loss of care and guidance to decedent's four children. Two of these children were under 5 years of age and will require substantial attention throughout the years of their minority. Each of these factors may have carried considerable weight in the deliberations of the jury. See *Allendorf*, 8 Ill. 2d 164, 179-80.

Furthermore, the trial court denied the defendant's motion for a new trial, or, in the alternative, for a substantial remittitur. Defendant had urged that the verdict was so grossly excessive as to indicate that the "deliberations of the jury were tainted by improper or prejudicial consideration." The trial court was in a better position that is this court on

review to determine whether the jury was moved by passion and prejudice. *Scully v. Otis Elevator Co.* (1971), 2 Ill. App. 3d 185, 201, 275 N.E.2d 905.

This court has previously upheld verdicts of similar magnitude. In *Scully*, this court upheld an award of $600,000 to a widow and two minor children. The testimony in that case showed the present value of the decedent's lost earnings in 1962—the year of the accident—to be $209,000. In the case before us, the present value of decedent's lost earnings was almost $100,000 more than in *Scully*; there are two more children here than in *Scully*; and almost 7 years have gone by since *Scully* was decided during which time inflation has greatly reduced the value of the dollar. Given these differences, we cannot say that this award is excessive absent any specific indication of passion and prejudice in the record.

For the foregoing reasons the judgment of the trial court is affirmed.

Judgment affirmed.

O'CONNOR, JR., and BUCKLEY, JJ., concur.

ORDER AND MANDATE OF THE ILLINOIS SUPREME COURT

United States of America

STATE OF ILLINOIS
SUPREME COURT } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the thirteenth day of November in the year of our Lord, one thousand nine hundred and seventy-eight, within and for the State of Illinois.

PRESENT: DANIEL P. WARD, CHIEF JUSTICE
JUSTICE ROBERT C. UNDERWOOD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE HOWARD C. RYAN
JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS J. MORAN
JUSTICE THOMAS E. KLUCZYNSKI
WILLIAM J. SCOTT, ATTORNEY GENERAL
LOUIE F. DEAN, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 30th day of November 1978, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

KANDYTHE J. LIEPELT,
Administratrix of the Estate of
Delroy Liepelt, Deceased,
Respondent

No. 51115 *vs.*

NORFOLK AND WESTERN RAILWAY
COMPANY, a corporation,
Petitioner

Petition for Leave to
Appeal from Appellate
Court First District
77-677

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by her in this behalf expended, to be taxed, and that she have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 26th day of December, 1978.

(SEAL)

/s/ CLELL L. WOODS,
Clerk,

Supreme Court of the State of Illinois.

EXCERPTS FROM THE TRIAL RECORD

(R 664) MR. FLEISHER: Your Honor, the Plaintiff is called an economist and I would like to make an oral motion in limine at this time.

I am certain Mr. White knows there can be no mention of income tax under Illinois law and I refer specifically to the

case of Hall vs. The Chicago & North Western Railway Company.

THE COURT: May I suggest, sir, that you examine your witness first. Then after I have a chance to digest what his testimony has been, I will entertain your motion in limine with regard to Mr. White's cross-examination.

I don't know what you're going to bring out, so I can't anticipate what his cross will be.

MR. FLEISHER: All I am going to bring out, nothing as to any type of State or Federal law income tax, which is the Illinois law, and I know Mr. White is aware of it.

(R 665) THE COURT: If you're not going to bring out anything along those lines, of course you can't cross-examine on anything you haven't touched upon, but let's see what his testimony is going to be first, please.

* * *

(R 710) THE COURT: . . . .

So your next question, Mr. White.

(R 711) MR. WHITE: Well, any questions, I would like to be heard on. It will be along the lines that Counsel made the motion on before he put the witness on the stand.

THE COURT: The jury will be excused for a moment.

(Whereupon, the following proceedings were had in open court, out of the presence of the jury.)

MR. WHITE: I think this should be outside the presence of the witness.

THE COURT: You are excused, sir.

Henry, do you want to show the Professor back to my chambers and make him comfortable.

(Whereupon, the witness left the witness stand.)

MR. WHITE: If the court please, Dr. Friedman mentioned in the course of his testimony something about income tax. I forget exactly what it was,

At any rate, the—I propose to and ask leave to ask him if he's taking into account (R 712) the fact that any amount recovered, either for death benefits or for injury, damages, is not subject to any income tax, which is a big difference.

THE COURT: That has been frowned upon consistently by Illinois Courts, as has reference to insurance.

A reference to insurance giving rise to motions for non-suit and references to freedom from income tax responsibility cases of recovery for injuries and deaths such as this are each entitled to swift response by way of granting of a motion for mistrial.

I am delighted that you asked your question and made your comment out of the presence of the jury, and I commend you for that, Mr. White.

However, if your objection in going into the area of income tax deals with the amount of tax that might be recoverable by the Government from the verdict amount, if one is returned in this cause, then the motion in limine is sustained.

MR. WHITE: I wasn't going to put it exactly that way. I was going to ask him if he took into (R 713) account in his computations that any amount paid in damages is not subject to income tax.

THE COURT: And that would give rise to an immediate motion for mistrial and I would have to grant it.

And consequently the motion in limine is sustained.

MR. WHITE: May it stand as an offer of proof?

THE COURT: Of course. It isn't necessary.

Let the record show that if you were to ask this man whether he knows if any recovery granted by the jury herein was subject to income tax or not, his answer would have to be that there will be no tax paid on any recovery.

I think that all parties here would stipulate that that is what his answer would be.

MR. WHITE: That is the law.

THE COURT: Yes, that is the law.

* * *

(R 738) THE COURT: Mr. White, you got a motion?

MR. WHITE: Yes. If the Court please, the Defendant wishes to make another motion to . . . declare a mistrial.

This one—

THE COURT: I don't know that you had made such a motion heretofore, Counsel.

. . . .

This one is that the Court erred in allowing Plaintiff's motion in limine, and in not permitting to ask the economist yesterday with reference to income taxes.

. . . .

(R 751) MR. LANDESS: . . . (R 752)

Counsel has referred to the I.P.I. Instructions that apply to cases of this nature, and cited 160 and those following. My recollection of the appropriate instructions refers to the fact that a jury may take into consideration in finding an award of damages or amount of damages, deductions that would have been taken from the earnings or the income of the Decedent. They mention deductions specifically in that instruction.

So on the one hand Plaintiff is allowed to put on an economist who can testify and project into the future what the earnings of the Decedent may be. On the other hand, the Defendant is precluded from showing what the deductions from those gross earnings would be.

(R 753) We can't show with any certainty what those deductions are. We're precluded. It's really not a fair position of the Plaintiff in this case.

. . . .

I submit that the jury would have no reasonable rationale basis to arrive at an award here unless they are able to hear both sides of the story, not just one, not what he would earn but what he would have to pay out of that.

When Counsel says this may be insignificant or small, that is not true. That is what Boxberger is telling us here. They do make a decision. This may not be true in all cases.

(R 754) If a man has an income of only a thousand dollars, well, income taxes are going to be insignificant, and I think the McQueen Case decision, as mentioned in Boxberger, this

knowledge, this will have no impact, but Boxberger and Cox say when you're getting into the $15,000 area, which we are in this case, as I understand from the testimony and as I have learned from the economist, that this will have a substantial impact, and our calculations show that it will have a substantial impact as to what they would actually realize.

I think that the Defendant is seriously prejudiced if he cannot, and we have not had that opportunity to show what deductions are. When a jury's given an instruction to say that they can consider deductions from this, and yet isn't given any evidence to show what those deductions may be, I submit that we have been prejudiced, Judge.

. . . . (R 755)

MR. FLEISHER: Your Honor, there are a couple of things that seem to be changing here. First of all, the items under I.P.I. that a jury may consider are those of personal use or consumption, those that are expenditures.

There's nothing in I.P.I. that allows the jury to consider the effect of income tax, (R 756) Federal, State, by being any type of deductions.

Secondly, Mr. White's objection, when he asked to question this economist, was what the effect would be on taxation on this award, whatever it may be.

Now, as I understand Mr. Landess, they are going one step beyond that. Now they are asking that the economist be allowed under Illinois law to be questioned and testify as to the man's deductions for income tax.

MR. LANDESS: No, no, no, no, no, Counsel.

I—I don't mean to interrupt, but that was not my point at all.

May I proceed?

MR. FLEISHER: Why, sure.

MR. LANDESS: When I said: "deductions," my understanding of the I.P.I. is that the jury may consider what deductions—not tax deductions, Mr. Fleisher, but what deductions may be taken from the overall—from the gross, and obviously one of the deductions that would be taken would be the income tax.

I didn't mean to imply what deductions (R 757) he would under the income tax.

MR. FLEISHER: That is specifically another element, as opposed to what Mr. White raised in his objection.

Mr. White asked that he be allowed to question the economist in regard to what effect if any, taxation would have on an award by this jury, whether any of this money was subject to a taxation that a jury might give, or they might receive.

Today's objection is that this money from his earnings will be or would have been in the future is subject to going into the question of taxation. So that what we're doing specifically, is overruling Illinois law, specifically overruling I.P.I. and allowing a whole new area of questioning every single potential litigant who has a future wage loss as to what taxes would have been on those wages, or that wage loss.

The reason that it has never been allowed under Illinois law, and in the number of Federal jurisdictions, and other states as well, you get into complete and total speculation.

(R 758) Who knows? In yesterday's paper, President-elect Carter is considering a major tax cut to take effect in 1977 right after he takes office.

THE COURT: All right. All arguments must end somewhere, and I'm about to have an end. And the ruling of yesterday will stand.

* * *

(R 1091) THE COURT: It seems the defense had a motion?

MR. WHITE: If the Court please, on behalf of the defendant I wish to make an offer of proof.

THE COURT: Proceed.

MR. WHITE: If we called an actuary by the name of Robert Barns (*sic*) he would qualify as trained, experienced actuary and that using work life expectancy tables with the decedent's age at death of 37.51 years, a period of calculation to date, 12-1-76, 3.02 years, period of further earnings 22.42 years, and he would deduct income taxes, State and Federal, amount to $57,000. In his computations and if he used a six percent interest rate the pecuniary interest of the survivors would be, total a hundred—present value would be $115,325.

THE COURT: A hundred fifteen thousand what?

MR. WHITE: $325.

Two, that he could use or he could (R 1092) testify that he worked primarily with pension funds, eighty-one and-a-half percent interest and including a five percent increase in future earnings, his present pecuniary value to survivor would be $138,327.

THE COURT: In other words, that's eight and three-quarters percent as opposed to eight percent?

MR. WHITE: Yes, that's right.

THE COURT: That figure came to what?

MR. WHITE: $138,327.

THE COURT: Thank you.

MR. WHITE: The reason I am making this as an offer is because of your Honor's previous ruling with reference to income tax.

THE COURT: Thank you, sir.

Anything else, gentlemen?

MR. WHITE: We would ask that he would also testify that fringe benefits should not be computed because they are continuing.

THE COURT: All right.

MR. FLEISHER: Your Honor, if I may, is this offer of proof being made in lieu of the testimony of this witness?

(R 1093) THE COURT: Apparently so. I understand it to be that way in light of the Court's ruling with regard to income taxes.

Mr. White has very properly made this statement for the record by way of an offering of proof as opposed to attempting to bring it out before the Jury which would not be possible in light of my prior ruling.

* * *

(R 1262) THE COURT: . . . . (R 1263) Now, we'll go to 19 and, of course, 19 will be rejected for reasons argued at length in the earlier part of the trial.

MR. WHITE: What's that?

MR. LANDESS: Taxes.

THE COURT: Income tax.

(RC 200) If your verdict is in favor of plaintiffs, your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award.

DEFENDANT'S INSTRUCTION NO. 19 (REJECTED)

Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952)

Burlington Northern, Inc. v. Boxberger, 529 F.2d 284 (CA 9, 1975)

Supreme Court, U. S.
FILED
JUN 29 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1323

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

KANDYTHE J. LIEPELT,

Administratrix of the Estate of
Delroy Liepelt, Deceased,
Respondent.

**On Writ of Certiorari to the
Appellate Court of Illinois,
First District, First Division**

Petition For Certiorari Filed February 26, 1979
Certiorari Granted April 16, 1979

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DOCKET ENTRIES

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased,
Plaintiff,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,
Defendant.

No. 74 L 13092

Excerpts From Docket

Complaint filed August 14, 1974

Answer filed September 13, 1974

Amended Complaint at Law filed August 27, 1976

Answer to Plaintiff's Amended Complaint at Law filed September 24, 1976

Defendant's Motions for Directed Verdict filed November 24, 1976

Defendant's Motion for Directed Verdict filed December 2, 1976

Judgment entered for Plaintiff December 3, 1976

Defendant's Post Trial Motion for Judgment filed January 3, 1977

Defendant's Notice of Appeal filed March 23, 1977

Defendant's Appeal Bond filed March 25, 1977

Report of Proceedings filed May 11, 1977

Appellate Court of Illinois

FIRST DISTRICT, FIRST DIVISION

No. 77-677

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased,

Plaintiff-Appellee,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Defendant-Appellant.

Excerpts From Docket

Docketed May 11, 1977

Short Record filed May 11, 1977

Additional Record filed May 25, 1977

Appellant's Brief and Abstract filed August 17, 1977

Appellee's Brief filed March 6, 1978

Appellant's Reply Brief filed April 17, 1978

Oral Argument April 17, 1978

Order Affirming Trial Court entered July 5, 1978

Affidavit of Intent to Appeal to Illinois Supreme Court filed July 26, 1978

Application for Certificate of Importance filed August 9, 1978

Order denying Certificate of Importance entered August 14, 1978

Motion to Stay Mandate filed December 28, 1978

Order Staying Mandate pending review by the United States Supreme Court entered January 8, 1979

Supreme Court of Illinois

NOVEMBER TERM, 1978

No. 51115

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT,

Plaintiff-Respondent,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Defendant-Petitioner.

Excerpts From Docket

Petition for Appeal filed August 30, 1978

Leave to Appeal denied November 30, 1978

Mandate issued December 26, 1978

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased,
Plaintiff,

vs.

NOLFOLK AND WESTERN RAILWAY COMPANY, a corporation,
Defendant.

No. 74 L 13092

COMPLAINT AT LAW

The plaintiff, KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased, by KARLIN AND FLEISHER and NEWCOMER, SHAFFER, GEESEY & HUTTON, complaining of the defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, states as follows:

1. That on or about the 22nd day of November, 1973, the defendant, NORFOLK AND WESTERN RAILWAY COMPANY, operating by and through their duly authorized agents and servants in their behalf were then and there in possession of roadbeds and yards wherein the defendant laid and maintained tracks and rails over which tracks and rails the defendant caused to be operated engines and cars used in the conveyance of passengers and freight for hire, and the defendants then and there employed in and about the operation of said railroad and moving of said locomotives and cars, servants and employees, all in the City of Wyatt, State of Indiana.

2. The plaintiff's decedent was then and there employed in the capacity of a fireman at or near the City of Wyatt, State of Indiana, and was engaged in performing the duties of his work at the time of the occurrence hereinafter complained of, and at that time part or all of the plaintiff's decedent's duties were in the furtherance of interstate commerce, or directly, closely, or substantially affecting such commerce; and by means of the premises at the said time and place, both plaintiff's decedent and his employer were engaged in interstate commerce, and their mutual rights and liabilities were governed and controlled by the Federal Employers' Liability Act, and plaintiff brings this action under the provisions of the Federal Employers' Liability Act.

3. That at the time and place aforesaid, and while the plaintiff's decedent was in the act of performing his duties as a fireman at or near Wyatt, Indiana, and while he was riding on a certain train of the defendant's, located on the defendant's track, said train was caused to collide and derail, which then and there caused the plaintiff's decedent's death; such action being as a direct and proximate result, in whole or in part of one or more of the following acts of negligence of the defendant's, in violation of the provisions of the Federal Employers' Liability Act:

a. Carelessly and negligently operated, managed and controlled their premises so that as a direct and proximate result, and in consequence thereof, the plaintiff's decedent sustained fatal injuries.

b. Carelessly and negligently failed to provide the plaintiff's decedent with a reasonably safe place within which to work.

c. Carelessly and negligently failed to provide the plaintiff's decedent with good and proper equipment, machinery or other appliances with which to perform his duties.

d. Carelessly and negligently failed to warn the plaintiff's decedent of the dangerous and unsafe condition that existed at the time of the aforesaid operation.

4. That the said DELROY LIEPELT, deceased, left him surviving the following:

Kandythe J. Liepelt, wife
Kyle Stanton Liepelt, son
Corey Allen Liepelt, son
Marilyn Kay Liepelt, daughter
Carolyn May Liepelt, daughter

who are his only heirs-at-law and next of kin; that by reason of the death of the said DELROY LIEPELT, deceased, the said heirs-at-law and next of kin have been deprived of large sums of money and valuable services which the said DELROY LIEPELT, deceased, was accustomed to contribute to and to perform for them, and would have contributed to and performed for them in the future, and other pecuniary damages the said heirs-at-law and next of kin of the said DELROY LIEPELT, deceased, therein and thereby by reason of his said death, then and thereafter have suffered and will in the future continue to suffer.

5. That on the 14th day of February, 1974, the plaintiff, KANDYTHE J. LIEPELT, was duly appointed and qualified by the Court of Common Pleas, Probate Division of the County of Williams, State of Ohio, as Administrator of the Estate of DELROY LIEPELT, deceased, and ever since has been and is now acting as Administrator of said Estate and brings into Court herein her letters of Administration so granted as evidence of her said appointment as Administrator herein.

6. That thereafter and subsequent to the appointment of the plaintiff herein as Administrator of the Estate of DELROY LIEPELT, deceased, by the Court of Common Pleas, Probate

Division of the County of Williams, State of Ohio, as aforesaid, the plaintiff, KANDYTHE J. LIEPELT, as such Administrator hereby commences this action in the Circuit Court of Cook County, Law Division, on behalf of and for the benefit of the heirs-at-law and next of kin of the said DELROY LIEPELT, deceased, on this 14 (sic) day of August, 1974 and within three years of the date of the death of the said DELROY LIEPELT, deceased, as aforesaid.

WHEREFORE, the plaintiff, KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased, asks judgment against the defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

KARLIN AND FLEISHER and
NEWCOMER, SHAFFER, GEESEY & HUTTON
Attorneys for Plaintiff

By: PETER D. CORTI
Peter D. Corti

111 West Washington
Chicago, Illinois 60602
346-8620

IN THE

Circuit Court of Cook County, Illinois

COUNTY DEPARTMENT, LAW DIVISION

(CAPTION OMITTED IN PRINTING)

ANSWER

NOW COMES the defendant, NORFOLK & WESTERN RAILWAY COMPANY, a corporation, by its attorneys, Gorham, Adams, White & De Young, in answering plaintiff's complaint and says as follows:

1. In answering paragraph 1, defendant admits that it carried on railroad operations near Wyatt, Indiana at the time alleged therein.

2. In answering paragraph 2, defendant admits that Delroy Liepelt was in its employment at the time and place referred to in said paragraph. Defendant has insufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in said paragraph and therefore neither admits nor denies said allegations but demands strict proof thereof.

3. In answering paragraph 3, defendant denies that Delroy Liepelt's death was caused in the manner or for the reasons alleged therein. Defendant further denies that plaintiff's decedent's death was caused by any wrongful acts or omissions of this defendant and specifically denies sub-paragraphs a, b, c, and d of said paragraph 3.

4. In answering paragraph 4, defendant has insufficient information or knowledge to form a belief as to the truth of the allegations contained therein and therefore neither admits nor denies said allegations but demands strict proof thereof.

In further answer to said paragraph 4, defendant denies that any losses that may have occurred were as a result of any wrongful acts or omissions of this defendant.

5. In answering paragraph 5, defendant has insufficient information or knowledge to form a belief as to the allegations contained in said paragraph and therefore neither admits nor denies said allegations but demands strict proof thereof.

6. In answering paragraph 6, defendant admits that the plaintiff caused to be filed a complaint in the above entitled case on August 14, 1974 in the Circuit Court of Cook County, Law Division. Defendant has insufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in said paragraph and therefore neither admits nor denies said allegations but demands strict proof thereof.

7. In further answer, defendant states that any of the injuries that plaintiff's decedent may have sustained were the proximate result of wrongful acts or omissions by the plaintiff's decedent or in the alternative alleges that said wrongful acts or omissions of plaintiff's decedent caused or contributed to cause the injuries complained of.

WHEREFORE, defendant, NORFOLK & WESTERN RAILWAY COMPANY, a corporation, denies that the plaintiff is entitled to judgment against it in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) or in any other sum whatsoever.

GORHAM, ADAMS, WHITE & DE YOUNG

Attorneys for Defendant
Norfolk & Western Railway Company

GORHAM, ADAMS, WHITE & DE YOUNG
One North LaSalle Street
Chicago, Illinois 60602
CEntral 6-5428

(Verification and Proof of Service omitted)

IN THE

Circuit Court of Cook County, Illinois

COUNTY DEPARTMENT, LAW DIVISION

(CAPTION OMITTED)

AMENDMENT TO COMPLAINT AT LAW

Having first obtained leave of Court, now comes the plaintiff, KANDYTHE J. LIEPELT, Administratrix of the estate of DELROY LIEPELT, Deceased, by her attorneys, KARLIN AND FLEISHER, and files herewith amendment to Complaint at Law, to wit:

9. Defendant at the time and place set forth, wholly regardless of the duties toward the plaintiff, was careless and/or negligent in one or more of the following particulars and thereby caused accident and injury to plaintiff:

(a) In failing to use ordinary care to furnish plaintiff with a reasonably safe place to work.

(b) In failing to exercise ordinary care to furnish plaintiff with reasonably safe instrumentalities with which to work.

(c) In failing to use reasonably safe methods in the conduct of its operations at said time and place.

(d) In permittting unsafe methods to be used in its operations at said time and place.

(e) In failing to equip the east end switch stand with an adequate banner with sufficient visibility to enable engine crew operating said train on its main line to read the aspect of the signal and switch position at a sufficient distance to control the operation of its train.

(f) In permitting the existing banner of the east end switch stand to deteriorate so that the signal aspect and

switch position had insufficient visibility to enable engine crew operating said train on its main line to read the aspect of the signal and switch position at a sufficient distance to control the operation of its train.

(g) In failing to maintain the existing banner of the east end switch stand so that the signal aspect could be read by the engine crew of said train at a sufficient distance to control the operation of the train.

(h) In failing to equip the east end switch stand with signal lights in violation of statutes of the State of Indiana then and there in full force and effect, Burns Indiana Statutes, 8-8-10-1 and 8-8-10-3, to wit:

> 8-8-10-[55-1248]. Switch lights.—Every steam railroad company operating wholly or partly in the State of Indiana shall place and maintain upon each switch in said state that is connected with the main track a signal light, attached in such manner to the moving panel of such switch that it will indicate safety when such switch is set to such main track, and that will indicate danger when such switch is not set to the main track. Said light shall be kept brightly burning constantly between the hours of sunset and sunrise, and on such days or parts of days as are dark and foggy. [Acts 1901, ch. 99 §1, p. 160]
>
> 8-8-10-3 [55-1250]. Switch lights—Injuries to employees.—For any violation of or failure to comply with any of the provisions of this act [8-8-10-1—8-8-10-4], such company shall be liable to all persons and employees injured by reason thereof, and no employee shall, in any case be held to have assumed the risk incurred by reason of such violation or failure. [Acts 1901, ch. 99, §3, p. 160.]

(i) In converting the passing siding from its primary and sole purpose of meeting trains, into a storage track, when defendant knew, or should have known that the storage of cars, with brakes set, on the passing siding

could result in a collision if a train were diverted from the main track to the passing siding at the east end switch.

(j) In failing to equip the rails of the passing siding leading from the east end switch with derail devices when it knew or should have known that such devices would have avoided a collision with cars stored on the passing siding if a train were diverted from the main line track into the passing siding.

(k) In failing to provide adequate patrol of the track in said area under existing conditions when it knew or should have known that that adequate patrol would have disclosed the position of the east end switch in time to have avoided the collision of the train with the cars stored on the passing siding.

(l) In failing in the general management of its railroad operations to adequately monitor its methods and practices so that the collision of the train with the cars stored on the passing siding could have been avoided.

KARLIN AND FLEISHER

Attorneys for Plaintiff

111 West Washington
Chicago, Illinois 60602
346-8620

IN THE

Circuit Court of Cook County, Illinois

COUNTY DEPARTMENT, LAW DIVISION

(CAPTION OMITTED)

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S ANSWER TO PLAINTIFF'S AMENDMENT TO COMPLAINT AT LAW

Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, by its attorneys, ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS, in answering plaintiff's amendment to complaint at law, says as follows:

9. Defendant denies each and every allegation contained in Paragraph 9 in plaintiff's amendment to complaint at law and all subparagraphs thereof.

NORFOLK AND WESTERN
RAILWAY COMPANY

By: ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
Its Attorneys

Charles F. White
Robert L. Landess
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza—Suite 3100
Chicago, Illinois 60611
Telephone: 467-9300

(Proof of Service omitted)

TESTIMONY

* * *

[347] (Whereupon, the following proceedings were had in open Court in the presence of the jury.)

* * *

JOHN SULCH, called as a witness herein, having been first duly sworn, examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLEISHER:

* * *

Q. Did you know Delroy Liepelt personally? A. Yes, he was a very personal friend of mine.

[348] Q. When did you first meet him? A. In 1972.

Q. And where was that at? A. At Mountpelier (sic). I think it was probably to reflect back, it was probably at a sorority function that my wife and Dell's wife are members.

Q. All right. Can you tell me roughly how much free time you and Dell spent together as friends? A. Well, in the railroading business at the time that I was—I knew Dell—I was in retailing.

In the railroad business, coming from a railroad town, you understand that these people work nights, mornings, afternoons. So I had my afternoons free—

MR. WHITE: Please. I don't see the necessity of this, or the pertinency.

THE COURT: Overruled. I can see where we're going.

MR. FLEISHER: You may continue.

THE COURT: Proceed, sir.

THE WITNESS: Thank you.

So the time that we spent was when [349] off we played golf. I had Thursday afternoons off. If Dell was in, we played golf.

Q. What about the time that was spent together, if any, as families with your respective children? A. Quite a lot. I would say that probably we got together at least once every ten days, two weeks.

Q. . . . Can you give us some type of personal observation or background as to Dell's handiness around the home, that you personally were aware of? A. Well, basic things. He mowed his own lawn. Some people have people mow their lawn.

He built a sandbox for the boy, Corey.

I'll reflect on Corey, because he was the oldest at the time, and the other baby was an infant.

He painted the inside of their house they were living in. I happened to sell him some appliances. I remember very vividly that he was going to vent the dryer. I said, "Well, I can send a man out. It will cost a few dollars." "No," he said, "I can handle that." And he vented his dryer, [350] for example.

He cooked. He liked to cook, believe it or not. Not because he had to, but because he liked to.

MR. FLEISHER: Can you tell us, if you would, whether you had any personal experiences with Dell in his work?

Were you aware of the type of work he did, or did you visit him on the job? A. Well, I was aware of the work, because I was brought up in that town. It's a railroad town, and Dell was an operator and a fireman. And, of course, his goal was to be an engineer.

I think that is a goal of everybody in the operating profession, in that line of business.

Q. Can you tell us something about Dell's background in dealing with the children in general in the community? A. Dell had a very—knack about him that I appreciated from the standpoint, besides his own children and my children, he was very active with, very responsible with, he took time with his children. He had patience. Patience from the standpoint of [351] Corey again.

I think at the time Corey was 3 years old. Potty-training Corey, it was important to him. It was important to Dell that he knew how to hit a baseball right.

He had a little plastic bat and ball, and on occasion—every other Sunday—I shouldn't say on occasion—for a year they would watch our children, because my wife and I bowled. We'd drop the kids off. And the oldest girl and Dell would—I guess when you have a boy around the house—he would go to the girl. When we came back he was always playing with her. This deep thing of his responsibility to the children, his own, plus kids around the neighborhood.

He played with the neighborhood kids. One time he was kidding about someone who came over and asked his wife if Dell could come out and play. One of the little kids.

He was well liked by the kids. He was the type of person that it was important. My little boy would talk to him and at that time he was like, gee, two, three about Corey's age—a

[352] little older maybe—and jabber and jabber and jabber and I would take him and say, "Here," give him to my wife.

Dell would take the child and set there and listen to him. Patience. And I respected that part of the man. And I think that that's the part—that's the part that their children are going to miss.

I only hope they have the responsibility in their personalities that this fellow did, and the people that were—I did and the people that were close to him.

MR. WHITE: Judge—

THE COURT: This objection is sustained.

MR. FLEISHER: Q. John, can you tell me what type of provider Dell was for his family, in your opinion as a friend? A. Dell's a real good provider. I think, as I knew him first, as an operator, then he went to firing like anybody you start out with children, I think things weren't the best or right at the first, financially, but he certainly provided and he was proud of the fact that he had this job, railroad, because, you know, it was a job that was respectable, [353] it was a respectable job. It was a community job. And not everyone gets to become an operator, a fireman on the railroad in our area.

He was very proud of the fact, and he worked hard to keep his position.

Q. Can you tell us what instruction or training that Dell gave to his children, say, in regard to sports, that you had personally observed? A. Personally observed? I'd say mainly it was the baseball thing.

Q. Okay. A. That was because of the child being so young, he really couldn't do much more at the time. It was a living room type of baseball, I suppose.

Q. Did you have any chance to see Dell give any care or attention, or instruction to his children in every day situations, other than sports activities? A. Well, he was, I think he was like, for example, the last time that I had seen Dell alive was about a week before he got killed and they had just purchased their house they were moving into. It was the first house they had owned, and he was [354] very concerned that the kids would have a bedroom of their own. They would have a playroom that he could fix up for the kids.

I was free to run around town, because I was in the retailing business, so I could leave when I wanted to, so I was driving down to take a look at the house. I guess he told me to come down a day or two before to come down.

He was out raking leaves. And he had the little rake and Corey had the big rake. I always remember. It was important that he show Corey how to rake, and so Corey had the big rake.

That was the last time.

Q. In Dell's free time, did you ever experience—did you have experience to see him with Corey, that you personally observed? A. Sure, all the time. If he had a day off he would come up town. They had a little car seat for him. I remember the car, the car seat. That thing reflects in my mind.

And he would always have Corey in the car seat when he had a morning off, or afternoon off. He would come in the store, and we would talk. He could have left the child home, because Candy wasn't [355] working.

MR. WHITE: If the Court please.

THE COURT: Sustained.

MR. FLEISHER: John, did you ever have a chance to talk to Dell about his twin daughters?

A. A few times. I know that the daughters would come up.

MR. WHITE: I'm going to object to these conversations.

THE COURT: Yes.

MR. FLEISHER: Q. Can you tell me specifically in regard to the twin daughters, do you know if Dell ever sent them birthday gifts and Christmas presents? A. Sure. I sold him the record player right before Christmas that we wrapped up and sent to them.

Q. Were you ever aware of the twins ever visiting Dell and Candy at their home? A. They visited in the Summertime for three, four weeks at a time. That is when Dell would get them. He would have liked to have them more, like at Christmas time, but I understood that wasn't allowed.

He planned when those girls came, he [356] planned a couple of weeks for them as best he could. He took them golfing one time. I remember that. Took them swimming.

But he made sure that those girls had just as much as those two boys did, because they were his daughters, and he didn't shun those girls, or he didn't look from the standpoint, you know, that they were not living with him. That wasn't the case with Dell.

He was responsible. They were his daughters, and he would have liked to have had them. They would have been better off with Dell if he could have had them.

* * *

[359] MR. FLEISHER: Q. Mr. Sulch, can you tell the court and jury, from your own personal observations, the type of

relationship that existed between Dell and his wife and children in general? Was it a good relationship, or not, sir? A. Definitely it was a good relationship.

Q. And did you ever have occasion to witness any unusual acts, such as was Dell a heavy drinker, did he have any reputation for that in the community? A. No, no.

Q. How about a big gambler, or anything like that? A. He never mentioned gambling. I'm sure he didn't. He didn't have the money to go out and gamble. He wasn't that type of person. George.

* * *

WILLIAM HEBBLETHWAITE, called as a witness herein, having been first duly sworn was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. FLEISHER:

* * *

[361] Q. Mr. Hebblethwaite, did you know Delroy Liepelt? A. Yes, I did.

Q. Approximately, when did you first meet him? A. Approximately December of '72.

Q. And where did you meet him? A. At his home on East Madison Street.

Q. Would you consider yourself a close personal friend of his? A. Yes. I would.

Q. Can you give the Court and jury some idea as to how much free time the two of you spent together? A. I would say that we would see each other at least once a week, be

only for a few minutes, or be it a time that we would go with the family to the lake on a picnic or some other function, be it to the park to play.

Q. In your opinion, was Dell handy around the house? [362] A. I would say he was very handy.

Q. Can you give us some specific example of what you had observed in regard to this area? A. Well, he had a problem with the house when he had bats in the wall, and he had enough foresight to go around the house looking for spots in which these bats could enter into the house, and going ahead and covering those holes and protect them so they couldn't get back in again.

And also I can remember the instance in which he went from top to bottom in that house, painted the inside instead of having somebody else do the work for him.

Q. Did you ever have an opportunity to discuss or observe Dell in his work capacity with the railroad? A. Well, we would talk about the railroad, where his work was, or where he had been, and what had happened.

In one case, we had occasion to go down to the yard—

MR. WHITE: I'm going to object to that if the Court please, conversations.

THE COURT: Conversations are excluded and the [363] jury is instructed to disregard them.

MR. FLEISHER: Q. You started to say you had an occasion to do what? A. Had an occasion to go down to the railroad yard to see an engine, with my son, and him and his son. And he explained to us what the functions of the engine were; how they operated, how they would go in reverse, how they would go forward, and the different dials and what they involved.

Q. This is with your son and his? A. Correct.

Q. Can you tell me, in your opinion, the type of provider that Dell was for his family? A. He was a person that tried to do what he could for his family. He tried to help them out. He gave them everything he could, that he was financially able to do, without exerting himself or putting himself in a financial problem.

He tried to give them guidance; tried to give them instructions, and help in various things.

He was very patient with his children. And he was providing for them and giving them [364] instruction.

One instance at the supper table, Corey was just starting to use a knife and fork, and Dell was trying to show him how to use them properly and he told him time and time again how to use them properly without getting upset or raising his voice.

He was a very patient man.

Q. Can you tell us something of Dell's background with the handling of children in general, that went to his instruction and care, and attention to them? A. He listened to the children. He listened to his kids. He listened to my kids and he was very helpful. Even in the fact, as when we were up to the lake once, Corey and my daughter, which was the same age, were swimming and he was out with them trying to teach them to float, trying to help with the basic strokes so they would be able to swim.

He even went as far as when they got tired of this, he went up on the beach and he played with them, building sand castles.

And Corey became very upset one day [365] with his dad. As we were out there, Dell was trying to learn how to ski. Anybody that's never skied, sometimes it's very hard falling. Corey became very upset. As a matter of fact, he cried and we had to restrain him from trying to help his dad, because he thought his dad was hurt at this time.

Q. Do you have any personal knowledge, or observation, Bill, as to the time that Dell spent with primarily Corey, when he was off work, relief days? A. When I first knew Dell, and we started to really get together, we were in the process of redoing a home ourselves, and he would come down quite frequently and give advice, and he always had Corey with him whether it was just for a few minutes or an hour but Corey was always with him at these times.

Q. Did you ever have an opportunity to see Dell giving any instruction to Corey in regard to sporting activities? A. Yes. He was a very—he wanted Corey to be a sportsman, because I guess this is always the father's dream that their kids are going to be active in sports in school, and he was always showing [366] Corey how to throw a baseball. And he had a plastic bat and baseball in the house, and he was pitching to Corey to help him do this.

Q. Bill, did you ever see Dell's twin daughters with him or visiting with him and Candy? A. Yes, I did.

Q. Can you tell me or did you know how often they would come and how long they would stay? A. I believe that if I remember correctly, I saw them twice, and it was always in the Summertime and it was always for a period—well, it seemed like three or four weeks at the period of time they were there.

He was a proud father, and he showed a great deal of patience with the twins. Very helpful. Very instructive to them. He tried to help them in everything that they did.

He always seen while they were there that they had something to do, or go to the park, or I have had my children down playing with the girls. He was always trying to keep them occupied so there wasn't actually a dull moment for them.

Q. Were you ever aware of any times that Dell sent gifts or presents for holidays to the twins? [367] A. Yes. There were occasions, which I can remember the—at Christmas time, when he was talking about sending gifts to his kids, and he was very concerned of the fact of getting them in the mail on time so they would get them before Christmas and not a period of time after. So that they would know for sure that they did have a Christmas present coming from him.

Q. Did you ever have a chance to see Dell drink heavily, or be intoxicated, drunk? A. No, I didn't.

Q. Are you aware of any gambling or characteristics that Dell had? A. Not to my knowledge, sir.

Q. Did you and Dell, your families, belong to the same church? A. Yes, we did.

Q. Did he and you attend the church with your families and children on a regular basis? A. Yes, we did. If he was there a lot of times we would sit together. In the Wintertime it was more frequent than the Summertime because he was outside with the kids, or maybe he was out playing golf, or something of that type.

MR. FLEISHER: Thank you, Bill.

* * *

[370] REDIRECT EXAMINATION

BY MR. FLEISHER:

Q. Mr. Hebblethwaite, your fourth and fifth children would be the ones who are closest in age with Candy and Dell's two sons, is that correct? A. That is correct, sir.

Q. Then most of the experiences that you have related, when I questioned you before, I take it dealt with those youngest two children and the Liepelts' two boys? A. That is correct.

* * *

[461]KANDYTHE JEAN LIEPELT, called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLEISHER:

* * *

Q. What is your date of birth? A. April 29, 1945.

Q. And how old would that make you now? [462] A. Thirty-one.

Q. Were you ever married? A. Yes.

Q. To whom? A. Delroy Liepelt.

Q. What was the date that you were married? A. October 8th, 1968.

Q. And where? A. Montpelier.

Q. Was this your first and only marriage? A. Yes, it was.

Q. And in regard to Del, was that his first marriage or not? A. No, his second.

Q. Can you tell me or do you know the name of his first wife? A. Yes, I do.

Q. What is her name? A. At the moment her name is Lucille Carol Tompkins.

Q. And do you know—

[463] MR. WHITE: Excuse me. Lucille what?

THE COURT: Tompkins. T-o-m-p-k-i-n-s.

MR. FLEISHER: Q. Did their first marriage—did Del's first marriage to Mrs. Tompkins end in divorce? A. Yes, it did.

Q. Do you know approximately when that divorce was obtained? A. The early part of the year, February or March, '67.

Q. Were there any children born out of that first marriage? A. Yes.

Q. How many? A. Two.

Q. Their names? A. Carolyn May Liepelt and Marilyn Kay Liepelt.

Q. Do you know their date of birth? A. May 18th, 1960. The same day as their father's birthday.

Q. They were both—they are twins, I take it? A. Yes, they are.

THE COURT: Carolyn and Marilyn?

[464] THE WITNESS: Right.

MR. FLEISHER: Q. The two girls are currently how old, then? A. They are 16.

Q. And where do they now live? A. Whitefish, Montana.

Q. With their mother? A. Yes.

Q. From the time that Del and his first wife were divorced, did Del support, in any way financially, his two daughters? A. Yes, he did.

Q. Was this done pursuant to some order of court? A. The divorce decree, yes.

Q. And do you know the amount of the child support that he contributed to his daughters? A. $120 a month.

Q. And for how long a period of time that you know had Del paid that sum of money? A. The entire time I knew him, every month.

Q. And that would be approximately how many years? A. About seven-and-a-half.

[465] Q. Were you personally aware of any time that he failed to make that monthly support payment? A. No, I'm not.

Q. Was this done by check do you know? A. Yes, it was. After we were married I wrote the checks.

Q. And you would then mail them, I take it? A. Yes.

Q. On a, as we said, a regular month-to-month basis? A. Yes.

Q. Did Del and you visit with the twins at any time? A. The twins came to visit us, yes.

Q. And was this done on any type of a regular basis? A. Yes. Every summer they spent, depending on the year and the circumstances, three to five weeks with us.

Q. Living with you? A. Yes.

Q. And during that time that they would [466] visit on vacations, did you have an opportunity to observe Del in the way he treated them? A. Oh, yes.

Q. And could you tell us, in general, the type of care or attention and guidance that he gave during those lengthy summer vacations that you observed? A. Well, whenever possible, when he knew they were coming, he would try to work his schedule where he had some time off. Occasionally he even took part of his vacation during their visit so that he could spend time with them because that was the only time he got to spend with them during the year.

We took them to amusement parks and took them to Cedar point (sic), which is an amusement park in Ohio. Before we moved to Montpelier we lived in Chicago. We took them to the Brookfield Zoo. He did things at home with them, projects. They were with him whenever he was not working.

Q. Did you notice any difference in his treatment or attention to his twin daughters as opposed to his own children, that is his—his additional children that he had with you? [467] A. No. I think he treated them both, all four of them, the same.

Q. Did you and Del or Del alone send any gifts at any time during the holidays to the girls? A. Yes. Del and I, together, sent them, every Christmas and every birthday we sent them presents, and special times in between, Valentine's Day and so on.

Q. Easter? A. I don't recall whether we ever sent them anything for Easter or not.

Q. Can you tell us what the general health condition was of your husband during the time you were married up until November of '73? A. He was in excellent health.

Q. Had he ever had any serious operations? A. Not while I knew him, no.

Q. Any serious or major hospitalizations? A. No.

Q. Did he have any extended time off of work due to any physical problems that you were aware of? A. He had an injury about a year before he was killed. On the railroad he hurt [468] his ankle. He was off for, I don't remember, I think four or five weeks.

Q. And was that the only injury that he had had during the time that you knew him? A. Yes.

Q. Can you tell us what your general health is? A. Excellent.

* * *

[483] Q. Mrs. Liepelt, can you tell the Court and jury what the general health of was of Del's twin daughters on and before November 22, of 1973? [484] A. The boys had excellent health.

Q. Were there any children born from your marriage to Delroy Leipelt (sic)? A. Yes, two.

Q. Can you tell us their names and dates of birth? A. Corey Allen Leipelt was born July 19th, 1970 and Kyle Stanton Liepelt was born on July 11th, 1973.

Q. How old were the boys at the time of this accident? A. Cory (sic) was three years and four and a half months or four months and Kyle was just four and a half months.

Q. I'm sorry, four—A. Four and one half months.

Q. Can you tell me what type of help Del gave you with your oldest son, Corey, from the time of your late pregnancy until shortly after he was born? A. He did basically everything I did. He helped change diapers. He helped with feeding. He would get up in the night, just like I did. We'd take turns. He got on the floor and played with him. He taught him, when he got old enough [485] to walk he taught him how to walk, helped with him. He helped me fix meals or fed the baby while I was fixing meals.

Q. Would much of the same answers apply to when your youngest child, Kyle, was born? A. Yes.

Q. Did Del give any special attention and guidance to your oldest son, Corey, that you can describe to the Court and jury? A. Yes. I would say it was exceptional.

Q. In what respects? A. All the time that he had off he would spend with his son or with us as a family, but quite often with just his son. He let him help him mow the lawn. He had a little lawn mower, he used to follow along behind his dad. He built a sandbox for him. He taught him how to play catch, how to hit a bat—hit a ball with a bat, took him golfing with him, taught him how to swim or tried to teach him how to swim. He's still a little afraid of the water. He was very, very patient with him.

* * *

[486] MR. FLEISHER: Q. Do you personally know if Corey remembers his father? A. Yes, he does. They were extremely close.

Q. And do you personally ever speak to Corey about his father?

MR. WHITE: Same Objection.

THE COURT: Sustained.

MR. FLEISHER: Q. What was your husband's position with the railroad initially and up until the time of his death? A. When he started with the railroad he was an operator, and (sic) agent operator. They are called operator because at one time it was a telegrapher's position, telegraph operator. They sometimes still operate the telegraph, but that's why they are called operators, an agent operator. He was on the extra board, which meant he worked vacations and people's

time off until he gained enough seniority to work on his own, and then he became a fireman.

[487] Q. And can you tell us what type of attendance record your husband had while working for the railroad? A. I would say it was excellent. He never took time off unless it was something extremely important or he was sick.

Q. Have you noticed that from the time that your husband died up to the present any particular problems with either of your sons? A. Yes.

Q. Can you tell us what you have observed?

MR. WHITE: That is objected to.

THE COURT: Overruled.

MR. FLEISHER: Q. You may answer. A. My oldest son, Corey, becomes quite upset. Once in a while I'll see him sitting in a corner crying for no reason at all. When I question him as to why he's crying, I find out that it's because he misses his dad.

* * *

[488] MR. FLEISHER: Q. Can you tell me who handled the family finances during the marriage? A. I would say mainly me. We both did, but since Del worked such unusual hours, he gave his paycheck to me and I would deposit it and pay most of the bills.

Q. Did you have a joint checking account? A. Yes, we did.

Q. Were you on any type of an allowance or budget? A. No, not really.

Q. Did Del always give you his paychecks? A. Most generally yes or else he would, if he happened to be, which

wasn't usually the case the day he got paid, but if he did happen to be off that day he would sometimes go deposit it himself.

Q. How often was he paid by the railroad? A. Twice a month.

Q. Did he keep out any type of expense money for himself? [489] A. Yes, fifteen or twenty dollars a week.

Q. What about his lunch? Did he eat out or did you make his lunch or what? A. I generally packed his lunch for him.

Q. Did Delroy spend money on himself, say for clothing? A. I wouldn't say it was much.

Q. Can you give us an approximation per year what he would spend on clothing? A. Oh—

MR. WHITE: That's objected to. Be hearsay.

THE COURT: Overruled.

MR. FLEISHER: Q. You may answer. A. I would say 200, $250 a year.

Q. Did he spend much money on himself for personal things? A. No.

Q. Can you tell us if your husband was handy around the house in any ways? A. Yes.

Q. Can you give us some examples? A. Yes. Together we painted the entire inside of the house that we were living in. It was a rented house, so the owner bought the paint and we did the work. He did some minor plumbing when the faucets [490] went bad. He mowed the lawn. He maintained the yard himself. He antiqued some furniture. We had some bookshelves that he had made and hung himself. When we bought a washer and dryer he installed it himself.

The house that we lived in did not have a garage when we moved there and the owners bought a garage and moved it in and Del helped with that, and he hung the garage doors and did all that work himself.

Q. Did Del drink to excesses? A. No. He'd have a beer occassionally (sic). That's all.

Q. How about gambling? A. No.

Q. Were you and your husband able to save any money? A. Yes.

Q. Did you have a specific savings account? A. Yes, we did.

Q. Do you know approximately how much money you were able to save per year? A. From a thousand to two thousand a year. Sometimes three, depending on the year.

Q. Can you tell the court and jury, Kandythe, [491] what type of provider was Del for you and the boys? A. I thought he was a very good provider.

Q. Prior to his death you rented a home? A. Yes.

Q. Had you and he made any plans, concrete that is, to buy a home? A. Yes, we had.

Q. Can you tell us those? A. We had signed papers to buy a house the day before he died.

Q. Can you tell us something about the house, the size? A. It was a three-bedroom home, living room, dining room, had a small extra room as a play room, kitchen, full basement, garage, nice sized yard.

Q. In regard to providing for your children, can you tell us what type of provider he was for them specifically? A. We

lived very comfortably. He—they were always well fed and well clothed and well taken care of. He loved them very much.

Q. What about providing for you personally? Would the answer be the same? A. Yes.

Q. During the period of time that you were [492] raising your children, did you have to work outside of the home? A. I worked for a six-month period.

Q. When was that and where? A. It was Montpelier and I don't remember the exact year. It was when Del was between being an operator and a fireman. Things were a little slow and I worked then for six months.

Q. Was that the only time from when you gave birth to Corey up until your husband's death that you sought work outside the home? A. Yes.

Q. Can you tell the Court and jury, Kandythe, what type of personal relationship did you and Del have? A. Very close.

Q. Can you tell us some of the things that you did together? A. Well, I would say anytime that he wasn't working we were together as a family or as a couple. We took vacations together. We spent holidays with my family, my parents and his sister and brother and mother. We just did everything together.

Q. Can you tell us of any hobbies or sports that you did as a couple? [493] A. Yes. We would go boating with friends or swimming. We bowled together. We were on a bowling league together, mixed couples, mixed doubles. We played golf together and when he died we had bought tennis rackets. We were going to take up tennis next spring.

Q. Did Del ever help you in and around the house with any of your chores? A. Yes, he did.

Q. Can you tell us what type of things he did with you in and around the house? A. He cooked, partly because he liked to and partly to help me. If I was busy with the children, especially when Corey was a baby and when Kyle was a baby, when they were small he would help vacuum and dust and make beds and he helped do all my house work when I was busy or didn't have time.

Q. During the—strike that. You were married a total of how many years, Kandythe? A. Just a little over five.

Q. And during that five-year period did you ever have any type of legal seperation (sic) or voluntary seperation (sic) from your husband? [494] A. Oh, no.

Q. How would you describe your marriage in general to the Court and jury?

MR. WHITE: I think that's already been done.

THE COURT: Overruled.

MR. FLEISHER: Q. You may answer. A. I would say it was a exceptionally close marriage. We weren't—we weren't just husband and wife. We were best friends.

Q. Kandy, did you work at any time or have you ever—strike that. Did you work at any time after Del's death? A. Yes.

Q. And when did you start working. A. Approximately a year and a half after his death.

Q. And where was that? A. At the Holiday Inn in Montpelier.

Q. Doing what type of work? A. I was a desk clerk, reservations.

Q. Are you still working there? A. No, I'm not.

Q. Are you working now? A. Yes.

[495] Q. Where are you working now? A. Montpelier Primary School.

MR. WHITE: I'm sorry. I din't (sic) get that.

THE COURT: Montpelier Primary School.

MR. WHITE: All right.

MR FLEISHER: Q. And what do you do there? A. I'm cafeteria supervisor and office help.

Q. How many days a week are you working now? A. Five.

Q. Do you have any expenses now that you did not have before the accident or expenses that were family expenses then that are additional now? A. All the family expenses we had then I still have, plus when I go to work I have to hire a baby-sitter.

Q. And how much do you—do you pay a baby-sitter weekly now since you work five days a week? A. Yes, I do.

Q. How much do you pay the baby-sitter? A. $15 a week.

Q. I'll show you what has been marked and received in evidence as Plaintiff's Exhibits Nos. 9, 11, 12 and 15.

In fact, well, what I'd like you to do, can you come down for a moment in front of the [496] jury, Kandythe?

(Whereupon the witness stepped down from the stand.)

MR. FLEISHER: Q. What I'd like you to do here in front of the jury is take each of these photographs, tell them what they show and approximately when they were taken and then as you finish the four of them, then we'll pass them around to the jury. Just take your time. A. That's Del and his twin daughters and our oldest son, Corey was about three at the time. Was about a year before he died.

THE COURT: Who took that photograph, do you know?

THE WITNESS: I did.

And that's Del, is laying on the floor and he has our youngest son, Kyle, on his chest, and that's Corey. He was playing with them. That was about a month before he died.

THE COURT: Who took that picture?

THE WITNESS: I did.

Coloring Easter eggs, Del and Corey, was taken about a year and a half before he died on Good Friday.

[497] THE COURT: Who took that picture, if you know?

THE WITNESS: I did.

And that's Del and our oldest son, Corey, our youngest son, Kyle, and me. That was taken one month before he died, the day Kyle was baptized.

(Whereupon the witness resumed the stand.)

MR. FLEISHER: May I circulate these?

THE COURT: Please.

MR. FLEISHER: In 1973, Kandy, can you tell us what the approximate earnings were of Del's? A. About $13,000.

Q. 13,000? A. Yes, sir.

Q. I have no further questions. Thank you.

* * *

[507] REDIRECT EXAMINATION

BY MR. FLEISHER:

Q. Kandyth (sic), you testified on cross-examination that Del began working for the railroad in approximately '71. Was he steadily employed, to your knowledge, before 1971?

Want me to repeat it? A. Yes, he was, but not by the railroad.

Q. That's what I mean. A. Oh, yes.

Q. He did have employment? [508] A. Yes.

Q. Various types of work. Did he ever do any type of—strike that. Did he play any type of musical instrument? A. Yes. He played the piano beautifully.

Q. Did he have any special training for the piano? A. Yes. He took nine years of piano lessons.

Q. Did he ever work professionally playing the piano? A. Before we were married, yes. He worked part-time.

Q. And where was that, in what city or town? A. In and around Chicago.

Q. Okay. How long did you work at the Holiday Inn in Montpelier? A. A little over a year.

Q. And you then changed jobs? A. Yes, sir.

Q. What the purpose of your changing? (sic) A. More money.

Q. Did you work full-time at the Holiday Inn? [509] MR. WHITE: I'm sorry. I didn't get the answer.

THE COURT: More money.

THE WITNESS: Yes, I—I'm sorry. What did you say?

MR. FLEISHER: Q. Him or me? A. You.

Q. Okay. Did you work full-time at the Holiday Inn? A. No, no, part-time.

Q. Was there any purpose for part-time employment by yourself? A. Yes. I have two small children and I don't feel that I can leave them full-time.

Q. Now that you're working at the Montpelier Primary School, you're working every day, as I understand it? A. Yes, sir.

Q. Do you work full-time there? A. No. I work four hours a day.

Q. Five days a week? A. Yes, sir.

Q. And what is the purpose for working just the four hours a day, five days a week? A. So I can spend more time with my children.

[510] Q. Does—strike that. Does Kyle go to any type of a nursery school? A. Yes. He goes to nursery school two mornings a week for two hours.

Q. And the other time he is with the sitter until you come home; is that correct? A. Yes.

Q. You testified that Corey is doing well above average work in school? A. Yes, sir.

Q. Who helps him with his homework? A. I do.

Q. Had you discussed with your husband before he died any type of college education for your children?

MR. WHITE: That's objected to.

THE COURT: Sustained.

MR. FLEISHER: Q. Had you or your husband made any provisions financially for your sons' ultimate college education?

MR. WHITE: That's objected to.

THE COURT: Sustained.

MR. FLEISHER: Q. Did you have any specific plans, [511] you personally, or (sic) your children's secondary education? A. Yes, sir.

MR. WHITE: That's objected to.

THE COURT: Sustained.

MR. FLEISHER: Q. Did your husband graduate from grade school? A. Grade school?

Q. Yes. A. Yes.

Q. Did he have a high school diploma? A. Yes, he did.

Q. When the twins came to visit from Montana, how did they travel? A. Sometimes by train and sometimes by airplane.

Q. And who paid the expenses of their traveling to Ohio to visit? A. We did.

Q. Had any money been set aside by you and your husband before his death for your children's further education?

MR. WHITE: That's objected to.

THE COURT: Overruled.

[512] MR. FLIESHER (sic): Q. You may answer. A. Yes, sir. That was part of our savings.

Q. And was there any other purpose or function for that savings account other than their further education?

MR. WHITE: That's objected to.

THE COURT: Sustained.

MR. FLIESHER (sic): Q. When were you notified of this accident? A. About 10:00 o'clock in the evening.

Q. And what evening was that? A. November 22nd.

MR. WHITE: Excuse me. I thought this had been covered. It's not redirect.

MR. FLIESHER (sic): I don't believe it was covered in my direct examination. If it's not proper redirect, I'd ask for leave to open my direct examination for a short period.

THE COURT: It was not covered in you (sic) direct and it was not covered in the cross-examination and I will grant your request to reopen your direct.

MR. FLIESHER (sic): Thank you, Your Honor.

Q. Around 10:00 o'clock in the evening? A. November 22, 1973, Thanksgiving Day. It [513] was three years ago today.

Q. I know this is difficult. Can you tell us where you were when you were notified? A. I was at my parents' house.

Q. And do you know who called and advised you of the accident? A. My father told me.

Q. And do you know who had notified him? A. Someone from the railroad.

Q. And were you told on that evening, on Thanksgiving evening, that there had been an accident? A. Yes.

Q. Were you told what, if anything, was the condition of Del? A. I was told he was crushed to death.

Q. I have nothing further. Thank you.

* * *

[653] MR. FLEISHER: May I proceed, your Honor?

THE COURT: Yes, sir.

MR. FLEISHER: Thank you.

The plaintiff Liepelt has marked as Plaintiff's Exhibit No. 25 for Identification the same National Labor Contract covering all unions in the national agreement and would, at this time, wish to offer it in evidence.

Any objection?

MR. WHITE: No.

THE COURT: It is admitted, and what's that, Exhibit No. 25?

(Whereupon, Plaintiffs' Exhibit No. 25 was received in evidence.)

[654] MR. FLEISHER: This is the national agreement that is in effect for all trades. The effective date being October 1st, 1972.

In 1974 there was a four percent effective increase which would have made Mr. Liepelt's 1974 total earnings $13,596.36. Effective January 1st, 1975 there was a ten percent reat (sic) increase. Effective October 1st, 1975 there was a five percent effective rate increase making his 1975 total earnings $15,142.92.

On January 1st of 1976 there was a 1.86 percent effective increase. On April 1st, 1976 there was a three percent effective increase which would have made his 1976 total earnings $16,378.20.

Effective July 1st, 1977 (sic) there will be a four percent increase making his total 1976 earnings, $16,828.26.

* * *

[664] (Whereupon, the following proceedings were had in open court, out of the presence of the Jury.)

MR. FLEISHER: Your Honor, the Plaintiff is called an economist and I would like to make an oral motion in limine at this time.

I am certain Mr. White knows there can be no mention of income tax under Illinois law and I refer specifically to the case of Hall vs. The Chicago & North Western Railway Company.

THE COURT: May I suggest, sir, that you examine your witness first. Then after I have a chance to digest what his testimony has been, I will entertain your motion in limine with regard to Mr. White's cross-examination.

I don't know what you're going to bring out, so I can't anticipate what his cross will be.

MR. FLEISHER: All I am going to bring out, nothing as to any type of State or Federal law income tax, which is the Illinois law, and I know Mr. White is aware of it.

[665] THE COURT: If you're not going to bring out anything along those lines, of course you can't cross-examine on anything you haven't touched upon, but let's see what his testimony is going to be first, please.

MR. WHITE: If the Court please, with reference to what we discussed before we adjourned, the reading of certain admissions, I wasn't waiving the initial objections I made to them.

THE COURT: The record is clear. Thank you, sir.

(Whereupon, the following proceedings were had in open court in the presence of the Jury.)

MR. FLEISHER: Your Honor, may I ask leave to reopen my direct examination of Mrs. Liepelt for roughly 20 seconds, and a couple brief questions, which she can answer from her seat.

THE COURT: Madame, I'd like you to consider yourself under oath.

THE WITNESS: Yes, sir.

KANDYTHE J. LIEPELT, recalled as a witness herein, having been [666] previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLEISHER:

Q. Can you tell us what your husband's date of birth was?
A. Yes, May 18, 1936.

Q. Can you tell us how old he was when he was killed?
A. 37.

Q. Do you know if your husband had any type of fringe benefits from his employment with the Defendant railroad?
A. Yes, he had health—

MR. WHITE: I'm going to object to that, if the Court please.

THE COURT: Overruled. You may answer.

THE WITNESS: He had hospital disability plan, and he had railroad credit union plan.

* * *

[667] BERNARD FRIEDMAN, called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLEISHER:

* * *

[670] MR. FLEISHER: . . . Doctor Friedman, do you have with you a table which is used for the calculating of life expectancy of individuals? A. I made a copy of the life table for 1973, from the statistical abstract of the United States. I hope that I have it with me.

Q. And, Doctor—A. Yes, I do have it.

Q. Doctor, is that the acknowledged authority in the United States, or one of the acknowledged authorities for computing life expectancy? [671] A. Yes, it is.

Q. Can you tell me, Doctor, in using that table what would be the life expectancy for a male who was 37 years of age in 1973? A. It would be something more than 34 years.

Q. Can you tell us, Doctor, what are the elements necessary for calculating the pecuniary loss where that is involved in the death of a man who leaves a wife and children? A. I have gone by the Illinois Jury instructions, and some other handbooks for expert witnesses, and I would be happy to explain the four elements.

There is the gross earnings a person would have had. There's the employer contributions to fringe benefits. There's

the value of household service that a person would have contributed at home, and as an offset to these contributions there's the amount that a person would have consumed himself, personal consumption.

Those are the four elements.

Q. Dr. Friedman, starting with the first one, in regard to gross earnings, can you give the Court or Jury some type of a historical [672] example or basis for explaining that term, so that we can understand it? A. Would it be all right if I bring the chart over?

THE COURT: Yes, sir.

(Whereupon, the witness left the witness stand.)

THE WITNESS: There were plenty of easels, but I brought my own.

I do want to illustrate the various procedures and concepts that are used in calculating pecuniary loss

THE COURT: You mean money lost, don't you, Professor?

THE WITNESS: Monetary loss.

THE COURT: The loss of money. Pecuniary is a word we sometimes don't use very often in our speech.

THE WITNESS: Something we can put a price tag on.

First, I want to show you something about what the historical record has been for long periods of time as to a person's earnings. So I asked you to think about a man who was earning [673] $5,000 per year in 1955. What would his total earnings have been over the next 20 years if he had done as well as the average worker.

Well, if earnings didn't grow at all from year to year, the total received over that period would simply be a (sic) $100,000; 20 times 5. However, the historical experience is that earnings have grown something more than five per cent on average per year over that period, and acknowledging or using that growth to calculate year by year what these earnings would have been, you would get a total of $165,000.

THE COURT: Let me ask you what you mean by "annual growth?"

Are you taking into consideration inflation, or a man getting promoted in his job?

THE WITEESS (sic): Well, technically, what they would be described by the Department of Labor, the wages paid per hour, that historically has had two components, and it's been about half productivity increase, which is due to training and due to the expansion of the plant equipment of industry, and the other half has been a poor compensation for the growth of prices.

[674] If you want people to keep working for you, you have to keep making it attractive in terms of what they can buy with it.

THE COURT: And five per cent is some kind of an average? Is that what you are saying?

THE WITNESS: I want to show you the particular years what this actual growth was.

These are five years in that period, and you can see that some years is higher, some years is lower. I won't comment on the political correlation here, but it's interesting to see that it could be high and it could be low.

And really when we're looking for a long period of time, we can't necessarily go by the last five years, the last year.

We want to take a period somewhat commensurate with how far in the future you're looking at.

So I computed a 20-year average and that was 5.6 per cent a year. On each year, on the average, earnings move by 5.6 per cent.

MR. FLEISHER: Professor Friedman, that would be in answer to His Honor's question as to how you came to the 5 per cent figure that was on the first page, is that right? [675] A. I don't want—I don't like to assert my own judgement (sic). I like to take the historical record and say what is conservative interpretation of the historical record. By "conservative," something that tends to keep all the dollars we calculate low, so I took a five per cent rate rather than a 5.6 in the illustration.

Q. Now, Doctor, can you turn back to the first example, and under B, where you have that 5 per cent annual growth of $165,330.

Where you have the settlement, is there anything that you have to use into your calculations to reduce that $165,000 amount to a present cash value in your calculations? A. Yes, there is.

Q. All right. A. There are earnings—this is a total that he would have received over a 20-year period and what we'd like to do is to take a whole future history like this and ask: Well, how much would that be worth today in a lump sum?

And that's where we bring in the concept of present cash value. A dollar that you're not going to receive for ten years, that is [676] not worth as much as a dollar today, because if you had a dollar today, you could invest that dollar and earn interest on it and in 20 years you would have more than a dollar.

So we want to take these future dollars and reduce them to their present cash value.

Q. Professor Friedman, can you show us, by way of hypothetical, in your chart as to what effect the reduction to present cash value, and how you arrived at it, would affect those numbers? A. All right, I will. I ask this question: What would this earning history, or this earning stream be worth in terms of present cash value in 1955?

And in order to do that, I have to make an assumption about what kind of interest rate has been earned of that lump sum over that 20-year period. Before I tell you about this hypothetical calculation, let me see if I can add one sort of interpretation to explain present cash value.

If we had, say, a 20-year period, we're concerned about, you could think of [677] starting 20 different bank accounts today. Each bank account is going to be totally withdrawn and closed on each one of those 20 years, but you put in the money for it today.

So you can see that the account that you're going to close next year, you have to put whatever will be enough that will—that with one year's interest will just be equal to what you want to take out in a year. An account you're not going to touch in 20 years, you don't have to put in as much today, because of the interest it will earn over that period, by the time 20 years rolls around, and you'll have a larger sum of money to meet that withdrawal.

The point of that example is just to emphasize at the end of 20 years there would be nothing left. It would be like closing 20 bank accounts.

Now, that calculation for the earnings of the example, $5,000 per year, growing at 5 per cent, using a 7 per cent in-

terest rate as to what that fund could have earned, gave rise to my estimate of $82,500.

So you can see that that does [678] reduce money based on the fact that money that you receive in a lump will earn interest between now and the time you have to use it.

Q. Professor, how did you arrive at the 7 per cent number that reduces that $165,000 down to $82,500? A. Well, there is no single interest rate that everyone should use, because in this interest rate, as you know, there are lots of ways of investing your money. There's a lot of ways of saving money. There's lots of securities that earn different rates of interest, and, in general, riskier securities earn you more, more interest.

And I really—it's not my position to estimate how much risk a person is going to take.

So what I did, basically, was to look at the same 20-year history of interest rates on the safest long-term securities which are Treasury Bonds or Triple A corporate bonds, and over that period the safest return was about 5 per cent on average.

However, I wanted to use an [679] interest rate that would be realistic in terms of what we're going to do about future projection. As you know, today, interest rates are a little higher than they have been historically, and Treasury bonds that you're going to go out and invest in have yielded in the 7 per cent neighborhood, and sometimes higher.

I took the figure 7 per cent because it's realistic in terms of safe assets today, that you might invest in for the long-term.

THE COURT: What is a Treasury Note or bond that you're talking about?

THE WITNESS: Well, I guess most of us are familiar with the little bonds we get on our birthday, where you pay $18.75. Then in ten years you get $25.00 back.

Well, in bigger denominations these bonds are generally on a face value of thousand dollars each. So you would buy it for a thousand dollars. In ten years you're going to get that thousand dollars back, but if in the meantime you have little coupons, or you have—it's registered with the government—so each [680] year you'll be able to get the interest on that thousand dollars.

I guess people can raise their hands if they have questions.

[681] MR. FLEISHER: Can you go back up on the witness stand and we'll continue.

(Whereupon, the witness resumed the witness stand.)

MR. FLEISHER: Q. Dr. Friedman, I want to ask you the following hypothetical question, and I want you to assume these facts.

First, that a male was born on May 18, 1936, and came to his death on November 22, 1973. He would have been at that time 37 years of age.

Further assuming that he was employed as a fireman for the Norfolk and Western Railway Company, and that for the period of 11 months prior to the date of his death he received gross earnings of $11,988 from his job as a fireman;

That under a union agreement effective October 1, 1972, which he was a party to, he would have received the following gross earnings up to and including December 31, 1977:

For the year 1974, gross earnings would have been $13,596.36; for the year 1975, gross earnings would have been $15,142.92; for [682] the year ending 1976, gross earnings

would have been $16,378.30; for the year 1977, gross earnings would have been $16,828.26;

That the railroad he worked for had a compulsory retirement age of 65 years. That through his union contract he had certain fringe benefits, including employer contributions toward health, disability plans, hospital plan, and credit union participation;

That he spent personally betwen $15 and $20 a week for his own personal consumption of goods, and that he spent furthermore $250 a year for his own clothing and other personal items.

He was in excellent health up to and immediately before his death. He further performed many household services, including painting, carpentry, home and land maintenance, appliance installation, door hinging (sic), and minor plumbing in and around the home.

He left as his heirs and next of kin a widow born April 29, 1945. He also left four children; twin daughters born May 18, 1960, a son born July 19, 1970, and another son born [683] July 11, 1973;

That he undertook numerous child care activities, including night feedings, diapering and dressing of the children, babysitting, and sick bed functions.

He furthermore actively participated and contributed in the training, guidance, advice, attention, and instruction of his children.

Now then, Doctor, assuming all these facts which I have just given to you as true, and based upon your own experience and training and interpretation of standard life tables, and also upon a reasonable discount factor, and historical ex-

perience of wage increase, do you have an opinion as to the present value of future losses? A. Yes, I do.

Q. And, Doctor, can you tell us what that opinion is? A. Why don't I give you the total present cash value estimate. Then we can talk about the elements that go into it.

Q. Fine. [684] A. The total is approximately $302,000.

THE COURT: That is the cash value of his gross earnings?

THE WITNESS: That is the present cash value of the contributions to the wife and dependents, or in other words the pecuniary loss.

THE COURT: Thank you.

MR. FLEISHER: Q. Doctor, can you tell us how you arrived at that figure, using whatever you have to explain or to demonstrate? A. Okay. Well—I'm sorry. I'd like to ask you to again draw your attention to the easel.

(Whereupon, the witness left the witness stand.)

THE WITNESS: Well, I tried to summarize in one table the four elements of monetary loss, and offsetting factors to be considered in the total present cash value.

And the period really breaks down into two. First, 1973 to the present, which is based upon earnings which are given by the recent union contract. The future period until retirement [685] at age 65 is the 24-year period from 1977 through 2000.

Now, in each period I calculated the gross earnings using that historical 5 percent growth assumption, fringe benefits. That is the cash value of employer contributions to health insurance, disability plans, and so forth.

I estimated as 5 percent of gross pay. There is a standard package of Travellers and Aetna plans the railroad unions

have negotiated, and I have looked at that package, and those three items are in general more than 5 percent of a person's gross pay.

Then the household service I estimated to—it's hard to put a price tag on a lot of those things, and there are some I didn't try to put a price tag on—but I did make some effort to estimate household service, and I attached a 9 percent of gross pay as household service. I'll explain that possibly later.

Finally, against the income and services in this you have to offset the personal consumption. And using the assumptions for this period, which you have asked me to assume, that [686] is $20 per week, plus $250 per year, in 1973 that would have been about 10 percent of gross pay.

So in this period I took 10 percent of gross pay as a personal consumption.

In the later period—for the later period I used some family budget studies that have been done by the Bureau of Labor Statistics to estimate the difference in the expenditure of families with and without one of the adults. And by comparing families with what they call a moderate standard of living, by comparing standards with or without one of the adults, and with the number of children, you get some estimate of how much you should reduce a family's income by to recognize the personal consumption of the deceased.

Now, generally while the children would be at home a rate of about 25 percent would be appropriate when there's three or four children, but there would be a period in here when there would be no children at home—they would all have reached age 21—and at age 21 then I think it's reasonable to take 50 percent as the [687] estimate of personal consumption.

So in fact I took a weighted average of 25 percent for the years that the youngest child would still be under age 21, and at home, and averaged that with 50, for the years that the youngest child would be 21, and that average was 31. And that is why I subtracted this amount here, 31 percent of gross earnings.

MR. FLEISHER: Q. While you're still up there, Dr. Friedman, how reasonable is it to use the national figures for the annual rate of growth of earnings that you have used in those computations? A. I think it's reasonable, because we can compare that with what's happening with Mr. Liepelt's earnings under his current union contract, with what the national experience was during these same years.

And during—I do have—during the period 1973 through 1976, according to that contract, his earnings were rising at a rate of about 8 percent a year—8.1. The national rate during those same years on an average was 7.1.

[688] So (sic) the basis of that, I thought it would be realistic to assume the national rate would give a pretty clear indication of his own earnings growth over the future.

Q. Professor, you earlier gave us an example of what you called reducing a gross earning to present cash value? A. Yes.

Q. Have you in your example for the gross earnings of $46,000-plus, and the gross earnings for $306,000-plus, reduced them to present cash value? A. [689] No. This number should not be reduced to present cash value.

This is not something that would have happened in the future. This is something that has already happened.

In fact, this should be accumulated with interest, because in the meantime, if you didn't have your income, you'd have

to maintain a standard of living, you would have to borrow or use up your assets. So that actually there's no need to reduce this to present cash value.

In fact, quite the reverse is true. You should increase it. However, this later period must be reduced to present cash value, and I used the 7 per cent interest rate assumption.

Q. And, Doctor, why would that 7 per cent number be reasonable in discounting the present cash value in this day and age? A. May I go back?

Q. Sure.

(Whereupon, the witness resumed the witness stand.)

THE WITNESS: Well, the 7 per cent interest rate is a little bit higher than historical [690] experience over a long period of time, but since today there are bonds of a 20-year duration, where you can for sure earn a high yield, I thought it was necessary to consider that in making the calculation.

There are bonds, safe assets that you can invest in today and earn a yield of 7 per cent.

Now, you wouldn't invest all of your assets in any one security, because some of that money you'll need before the end of 20 years. And then you never know what price you'll get for a bond if you have to go and sell it before maturity, so you actually want to have a mixture of assets that are short-term, bank accounts, savings and loan certificates, combined with some assets that are long-term where they guarantee you a high yield for a long time.

In addition, you may even want to use some of the money to take a little more risk with higher yield than corporate securities. But I must remind you that every now and then

there's something like a Penn Central or New York State Municipal bonds which people believed to be safe [691] and then they turned out to be not safe.

MR. FLEISHER: Q. Professor, the numbers that you use for household service, the $4,158, and the $27,572, can you tell us the reasonableness and the way in which you calculate those numbers? A. Well, I can't give you a precise number for household service, obviously, but what I did do was to estimate on the basis of living in a home and taking care of it and having four children, one day per week, and in 1975, one day per week hiring someone at the average compensation of what the Bureau of Labor Statistics called the service industry, that is a mixture of plumbers, auto mechanics, babysitters, and so forth, that works out to about $1,456 per year.

And in that year, that was a little bit greater than 9 per cent of Mr. Liepelt's gross pay estimate.

Q. Professor, the 10 per cent number that you took for personal consumption, from '73 to '76, what calculation did you make, or what assumptions did you have to come up with that number? A. Well, you asked me to assume $20 per week—[692] $20 per week, plus $250 per year, and that's $1,290 a year. And I divided that by 13,000, which is approximately the 1973 earnings, and you can see that that's about 10 per cent. A little bit under 10 per cent.

Q. Can you tell us the reasonableness and rationale that you took in applying the 31 per cent figure for personal consumption in the later years of this deceased? A. Well, I used an average of the years when there would be children at home and years when there wouldn't be children at home. And over the 18 years when there would be a child at home, I assumed 25 per cent.

Then over the remaining years I assumed 50 per cent.

So taking an average of the 25 and 50 over the years which they apply, I got a 31 per cent average. So I used that.

Q. Doctor, why—is your dollar loss for fringe benefits reasonable and proper calculation in your opinion? A. Well, from my experience before with railroad unions, I had some data on the employer [693] contributions for the basic health benefits, hospital and disability plans, and—well, those numbers are quite substantial.

Family health insurance coverages (sic) about $800 a year. A little more than that. And that's 5 per cent of your gross pay if your gross pay is $40,000.

Now, in this case the employer contributes a total value of the health plan, so the 5 per cent is in my view a clear underestimate of the value of these fringe benefits. These are plans that a family will want to replace. These are plans that you can—you don't really want to do without just because a person is deceased, or loses his job. You'll have to replace them elsewhere.

In fact, you may not be able to find as good a plan for the same money elsewhere. So these are things of real value that you lose in losing your employment, or losing a worker in the family.

What I didn't use was vacation, holiday pay, meals on the road, and so forth, because you have to be alive to get those. And [694] that's—they're irrelevant.

Q. Doctor, can you actually calculate a dollar loss for the element of rearing, training, instruction, advice and guidance of the deceased's four children? A. No, I didn't try to put a price tag on that.

Q. Is there any statistics that are available, to your knowledge, for putting a dollar loss for those elements in regard to

minor children? A. I don't know of any that are commonly used for that purpose.

MR. FLEISHER: Thank you. You may cross-examine.

THE COURT: Proceed.

CROSS EXAMINATION

BY MR. WHITE:

MR. WHITE: Q. Mr. Friedman, all of your calculations are based on the assumption that an individual would live the life span that that table that you refer to mentioned? A. The life expectancy was more than enough to go to reach age 65.

[695] Q. Yes. A. You know the life expectancy is like the average weight of a group of people; you have some people that weigh 100 pounds and some people that weigh 200. The average weight is 150.

So some people will not live that long. Some people will live a lot longer. And the life expectancy is an average.

* * *

[707] Q. What would the figures be if you took 6 percent instead of 7? A. As an interest rate?

[708] Q. Yes. A. They would be substantially larger. That is the total gross earnings loss, this present value would be larger, because you would need more money today invested at 6 percent to yield the kind of yield you would get if you invested it at 7 percent.

So 6 percent would lead to a higher estimate of monetary loss.

Q. Well, you mentioned municipal securities or bonds, I believe, being 7 percent being about the average yield? A. No. I think they yield substantially less. The highest rating, municipal bonds, the safest, my impression is that they're yielding less than 7 percent.

Q. Of course, if you have bonds like you mentioned, or I believe you referred to the New York State, you would lose everything, close to everything? A. You might be delayed in getting your money back when you wanted it. They haven't actually defaulted. They have just had a—

Q. New York City? [709] A. —a slow-down on paying them back.

Q. What about New York City? A. They haven't defaulted on their bonds.

* * *

[711] MR. WHITE: Well, any questions, I would like to be heard on. It will be along the lines that Counsel made the motion on before he put the witness on the stand.

* * *

(Whereupon, the following proceedings were had in open court, out of the presence of the jury.)

* * *

MR. WHITE: If the court please, Dr. Friedman mentioned in the course of his testimony something about income tax. I forget exactly what it was.

At any rate, the—I propose to and ask leave to ask him if he's taking into account [712] the fact that any amount recovered, either for death benefits or for injury, damages, is not subject to any income tax, which is a big difference.

THE COURT: That has been frowned upon consistently by Illinois Courts, as has reference to insurance.

A reference to insurance giving rise to motions for non-suit and references to freedom from income tax responsibility cases of recovery for injuries and deaths such as this are each entitled to swift response by way of granting of a motion for mistrial.

I am delighted that you asked your question and made your comment out of the presence of the jury, and I commend you for that, Mr. White.

However, if your objection in going into the area of income tax deals with the amount of tax that might be recoverable by the Government from the verdict amount, if one is returned in this cause, then the motion in limine is sustained.

MR. WHITE: I wasn't going to put it exactly that way. I was going to ask him if he took into [713] account in his computations that any amount paid in damages is not subject to income tax.

THE COURT: And that would give rise to an immediate motion for mistrial and I would have to grant it.

And consequently the motion in limine is sustained.

MR. WHITE: May it stand as an offer of proof?

THE COURT: Of course. It isn't necessary.

Let the record show that if you were to ask this man whether he knows if any recovery granted by the jury herein was subject to income tax or not, his answer would have to be that there will be no tax paid on any recovery.

I think that all parties here would stipulate that that is what his answer would be.

MR. WHITE: That is the law.

THE COURT: Yes, that is the law.

* * *

[738] THE COURT: Mr. White, you got (sic) a motion?

MR. WHITE: Yes. If the Court please, the Defendant wishes to make another motion to withdraw a juror and declare a mistrial.

This one—

THE COURT: I don't know that you had made such a motion heretofore, Counsel.

MR. WHITE: I think I have.

THE COURT: Proceed.

MR. WHITE: The witness is crying.

This one is that the Court erred in allowing Plaintiff's motion in limine, and in not permitting to ask the economist yesterday with reference to income taxes.

I call your honor's attention to the case of—

MR. LANDESS: If (sic) can interrupt my partner, Mr. White—

THE COURT: State your name for the record.

[739] MR. LANDESS: Yes. Robert Landess.

Judge, yesterday the Plaintiff relied on the case of Baird v. CB&Q—this is a recent Illinois case—in support of their motion in limine to prevent the Defendant from examining the economist on the income tax.

I read this case, and I have a photocopy of it, and the only mention of income tax that appears is at Page 468.

It's a very historical reference that during the trial the railroad attorneys were allowed—not allowed—it wasn't objected to—but, in fact, cross-examination of Plaintiff's economist, Dr. Cohen, as to income tax.

No objection was taken, and it was not a point on appeal.

The only point on income tax was the historical or factual value.

Perhaps the Court has seen it, but I have marked the appropriate pages.

The most recent decision on the admissibility of income tax during the course of a trial is the Burlington Northern versus [740] Boxberger, which is a case cited by the U.S. Court of Appeals.

THE COURT: Do you have any Illinois cases?

MR. LANDESS: If the Court please, under F.E.L.A., Federal Law applies, State Law does not.

It was a 7th Circuit case.

THE COURT: Do you have any Illinois cases that deal with F.E.L.A.?

MR. LANDESS: I have Federal cases, because Federal cases control, and this is what Boxberger says.

THE COURT: Are you suggesting there are no F.E.L.A. cases tried by the Illinois State Courts?

MR. LANDESS: No, I did not suggest that at all. My point is: The controlling law is Federal Law, not State Law. We have to look at the Federal decisions. This is what Boxberger says.

THE COURT: Can we look at Illinois decisions that interpret F.E.L.A. and Federal Law?

MR. LANDESS: If they are applying Federal Law. I'm suggesting that the 7th Circuit, in [741] Cox versus Northwestern Airlines permitted income tax testimony.

The most recent Federal decision is the Boxberger case, that I'm referring to the Court this morning, where it says it should be admitted.

For the purposes of the record, 529 Federal Reporter 2nd, 284.

I have a photostatic copy of the decision.

MR. FLEISHER: What is the decision?

MR. LANDESS: I'm sorry.

MR. HARRINGTON: 529 Federal Reporter 2nd, 284.

THE COURT: In this Boxberger opinion that you have shown us from the 9th Circuit, the Court after a detailed consideration of its view with regard to the admissibility of instructions dealing with income tax, states on Page 296, that four Circuits have upheld the trial judge's refusal to give an instruction that the award is non-taxable, and there they cite an opinion from the 10th Circuit, an opinion from the 5th Circuit, [742] an opinion from the 2nd Circuit, and an opinion from the 6th Circuit.

They cite with favor the 3rd Circuit. And they find in accordance with the ruling of the 3rd Circuit.

And, of course, that is their privilege.

But there is, I'm sure you'll agree, decided authority in these courts on the subject.

MR. LANDESS: Yes, I think you will also find that the courts referred to the 7th Circuit, the Circuit we are in, the Cox Case. I underlined the decision.

The Cox Case also applied Federal Law, and in the Cox Case, they allowed income tax.

THE COURT: Are you saying that this Court is bound by the findings of the 7th Circuit?

MR. LANDESS: I think this Court is bound to follow Federal Law.

THE COURT: Don't you acknowledge there is a division of opinion in the Federal Courts?

[743] MR. LANDESS: Yes. And I also acknowledge that the 7th Circuit, the Circuit we are—which we are located in, has favored evidence as to income tax.

I'm also acknowledging that this is the most recent decision in the Federal Courts as I know it, Judge.

THE COURT: And you therefore feel, because of an opinion in the 7th Circuit, that this Court is bound by that opinion?

MR. LANDESS: I think the Court should follow the decision in the 7th Circuit.

THE COURT: You don't answer my question. I know what you think the Court should follow.

I'm asking you: Do you think this Court is bound by the decision in the 7th Circuit?

MR. LANDESS: Yes, I do. I think you are bound by the ruling in the Cox Case, and you're bound by the most recent decision in the Federal Court, which is the Boxberger Case.

THE COURT: Even though that is in the 9th Circuit?

MR. LANDESS: Yes, Judge. I think that is [744] the most recent and the most enlightened opinion on the subject.

THE COURT: You feel that the Illinois Courts are bound by it?

MR. LANDESS: I think you should follow it, yes.

MR. FLEISHER: Your Honor, I'm sure that the Court is aware that in the field of economics there is a new area for law being made and being changed in all states, be it at State level or Federal level, almost on a daily basis.

The Boxberger Case itself, as the Court has ably stated, shows a complete division of opinion in the various Circuits.

The Baird Case, which was cited yesterday, not as to the tax situation, but can be found at 63 Illinois 2nd, 463, is an Illinois Supreme Court opinion in which the opinion was filed May 14, this year.

The reason that we mentioned the Baird Case is that this seems to be the most recent Illinois Supreme Court case which allows an economist to testify that wages will rise, at least as fast [745] as interest rates, and there is no such evidence in the Baird Case that was given by the economist yesterday.

THE COURT: I would like you to direct your remarks to this decision.

[746] MR. FLEISHER: Of the Illinois law that is apparent and clear on the issue of income tax is found, and has been held in the case of Hall v. the Chicago and North Western Railway Company, 5 Ill. 2nd, at Page 135. That is cited and quoted verbatim in the case of Allendorf v. the E. J. & E. Railway Company, which is found at 8 Ill. 2nd at Page 164.

THE COURT: What is the year of that 8 Illinois case?

MR. FLEISHER: The Allendorf case was decided in 1956. There is one short paragraph:

> "Appellee also points out that the testimony of the actuary was needlessly favorable to Defendant. Since the

trial of the instant case this court has held in Hall v. Chicago and North Western Railway Company, 5 Ill. 2nd 135, 'that the incident of taxation is not a proper factor for a jury's consideration, imparted either by oral argument or written instruction. It introduces an extraneous subject, giving rise to conjecture and speculation.' "

That continues to be the Illinois law. [747] I.P.I. is patterned after that. This is in essence what your Honor ruled yesterday.

THE COURT: Can you show me anything in the Allendorf case that deals specifically with the question of income tax?

MR. FLEISHER: Well, the Allendorf case involves, as your Honor has noted, the specific use here of the actuary testifying to the present value of future contribution after deduction of income tax. And there was no objection made by the Plaintiff's attorney, and then the Defendants later appealed because one of the elements being an excessive verdict, and the language that your Honor has read shows that if the Plaintiff would have objected timely that pursuant to the Illinois law the court would have been bound to sustain the objection.

Therefore, the Allendorf case ends up by saying: Certainly where the Plaintiff allowed it to go in, the Defendant would have no cause or no standing to argue on a point that is inadmissible under Illinois law to begin with.

As I said, in the Allendorf case, it states:

[748] "Plaintiff's attorney acquiesced in this ruling as well as the giving of instruction No. 27. The estimate of the actuary, by deducting income tax, was more than $10,000 less than it would be without such deduction. Furthermore, the actuary's testimony was based upon future net earnings until the time decedent would have become 69 years of age."

Then it ends by saying:

"Thus Plaintiffs unnecessarily limited their recovery by asking for computation only until age 65."

THE COURT: May I see the 7th Circuit case?

MR. LANDESS: Judge, I don't have the opinion with me, but while Counsel was speaking I noted the Court referring to the Cox case. I underlined some language there. It's a 1967 case. I can have the case brought in, if your Honor wishes.

THE COURT: How do you handle this, Mr. Fleisher?

MR. FLEISHER: Your Honor, the Boxberger case, as you pointed out, is a 9th Circuit case. [749] The F.E.L.A. allows states, as your Honor knows, to have concurrent jurisdiction along with the Federal courts in the trail (sic) procedure of these matters.

The question—the limited question of income tax being used at the trial of a cause of action would, by any stretch of the imagination, at most be procedural. It certainly is not a substantive issue, as those issues which are defined under the F.E.L.A.

The specific instructions in the I.P.I., those being 160 on forward, give you the substantive law which Illinois has incorporated into the I.P.I.

There is no question in my mind that the one procedural instance of whether or not Federal Income Tax can be shown at any cause of action during the proceedings of an F.E.L.A. case would be considered procedural, and would follow state law.

The Illinois Supreme Court in the Hall case speaks clearly to that point. Hall versus Chicago and North Western was an F.E.L.A. case.

[750] The Allendorf case, which cites it, was an Illinois Supreme Court F.E.L.A. case.

To now look to Federal law on the narrow issue of Federal Income Tax numbers being or not being admissible in the testimony of an economist would therefore take away the choice of the Illinois Supreme Court in the F.E.L.A. on this procedural issue.

I submit to the Court the Illinois Supreme Court, not the Appellate Court, but the Supreme Court, has clearly and distinctly says this and has not been overruled in explicit terms, cites (sic) here again in Allendorf:

> "Appellee also points out that the testimony of the actuary was needlessly favorable to Defendant."

The Illinois Supreme Court agrees with this, and then cites the Hall case, which they ruled on subsequent to the Allendorf case. And then later in Allendorf—and the procedural question, and it's a very narrow procedural question, in the scheme of over $300,000 that this actuary has testified to, can do nothing but inflame the minds of the jury upon the question of Federal taxation.

[751] MR. LANDESS: Your Honor, I didn't hear any response to what I thought the Court's question was, and that is responding to the Cox case.

Mr. FLEISHER: I don't have the Cox case before me. My answer would be the same, regardless of what the Cox case says. I have no idea why Counsel did not bring in the Cox case. It's a 7th Circuit case that he's relying on. But the answer would be the same.

The question of state taxes or Federal taxes is the same procedure. This is a case filed in the Illinois courts, and I

think we're bound to follow the rules of the State of Illinois courts in this proceedings (sic).

MR. LANDESS: I think the Boxberger—the case that Counsel refers to, Hall, 5 Illinois, I believe that is a 1955 decision. Allendorf, which really doesn't discuss income tax, from what I hear Counsel saying, is a 1956 decision, and we are referred to the Baird case yesterday, which is a recent Illinois case, which they are showing at the trial level that cross-examination did in fact occur as to income tax. No objection [752] was taken, but it's in the body of the opinion that this had transpired.

Again, as far as applying Federal law, as we must here, the most recent and only 7th Circuit decision, that I am aware of, is the Cox case, and the Cox case says we should.

Boxberger, the most recent decision of all of Circuits, and that says we should.

Counsel has referred to the I.P.I. Instructions that apply to cases of this nature, and cited 160 and those following. My recollection of the appropriate instructions refers to the fact that a jury may take into consideration in finding an award of damages or amount of damages, deductions that would have been taken from the earnings or the income of the Decedent. They mention deductions specifically in that instruction.

So on the one hand Plaintiff is allowed to put on an economist who can testify and project into the future what the earnings of the Decedent may be. On the other hand, the Defendant is precluded from showing what the deductions from those gross earnings would be.

[753] We can't show with any certainty what those deductions are. We're precluded. It's really not a fair position of the Plaintiff in this case.

I submit that the law on this, this trend is in favor of allowing, though granted that the Court is absolutely correct, there is a split in the Federal Circuits, no question about that. The most recent case has allowed this trend.

I think it's the better reasoned opinions, Judge, and the 7th Circuit has found that in the Cox case.

I submit that the jury would have no reasonable rationale basis to arrive at an award here unless they are able to hear both sides of the story, not just one, not what he would earn but what he would have to pay out of that.

When Counsel says this may be insignificant or small, that is not true. That is what Boxberger is telling us here. They do make a decision. This may not be true in all cases.

[754] If a man has an income of only a thousand dollars, well, income taxes are going to be insignificant, and I think the McQueen Case decision, as mentioned in Boxberger, this knowledge, this will have no impact, but Boxberger and Cox say when you're getting into the $15,000 area, which we are in this case, as I understand from the testimony and as I have learned from the economist, that this will have a substantial impact, and our calculations show that it will have a substantial impact as to what they would actually realize.

I think that the Defendant is seriously prejudiced if he cannot, and we have not had that opportunity to show what deductions are. When a jury's given an instruction to say that they can consider deductions from this, and yet isn't given any evidence to show what those deductions may be, I submit that we have been prejudiced, Judge.

MR. FLEISHER: I'm sorry, Mr. White.

MR. WHITE: Just, Judge, adding one comment. The F.E.L.A. doesn't expressly confer jurisdiction on State

Courts. They say that if [755] the State Courts wish to accept F.E.L.A. litigation, it's up to the State Courts. And our State Courts I think started with out (sic) Superior Courts, are the ones that decided they would accept jurisdiction in F.E.L.A. cases.

It's not automatically bestowed on them by the F.E.L.A. Act.

MR. LANDESS: Just one thing. If—I think I should call it to the Court's attention, we're standing here trying an F.E.L.A. Case, and Boxberger stated that—my recollection of reading Hall—the Court in the Hall Case did not say the F.E.L.A. will allow this. It seems to me the opinion in this—the Hall Case did not construe that point as they properly should have.

MR. FLEISHER: Your Honor, there are a couple of things that seem to be changing here. First of all, the items under I.P.I. that a jury may consider are those of personal use or consumption, those that are expenditures.

There's nothing in I.P.I. that allows the jury to consider the effect of income tax, [756] Federal, State, by being any type of deductions.

Secondly, Mr. White's objection, when he asked to question this economist, was what the effect would be on taxation on this award, whatever it may be.

Now, as I understand Mr. Landess, they are going one step beyond that. Now they are asking that the economist be allowed under Illinois law to be questioned and testify as to the man's deductions for income tax.

MR. LANDESS: No, no, no, no, no, Counsel.

I—I don't mean to interrupt, but that was not my point at all.

May I proceed?

MR. FLEISHER: Why, sure.

MR. LANDESS: When I said: "deductions," my understanding of the I.P.I. is that the jury may consider what deductions—not tax deductions, Mr. Fleisher, but what deductions may be taken from the overall—from the gross, and obviously one of the deductions that would be taken would be the income tax.

I didn't mean to imply what deductions [757] he would (sic) under the income tax.

MR. FLEISHER: That is specifically another element, as opposed to what Mr. White raised in his objection.

Mr. White asked that he be allowed to question the economist in regard to what effect if any, taxation would have on an award by this jury, whether any of this money was subject to a taxation that a jury might give, or they might receive.

Today's objection is that this money from his earnings will be or would have been in the future is subject to going into the question of taxation. So that what we're doing specifically, is overruling Illinois law, specifically overruling I.P.I. and allowing a whole new area of questioning every single potential litigant who has a future wage loss as to what taxes would have been on those wages, or that wage loss.

The reason that it has never been allowed under Illinois law, and in the number of Federal jurisdictions, and other states as well, you get into complete and total speculation. [758] Who knows? In yesterday's paper, President-elect Carter is considering a major tax cut to take effect in 1977 right after he takes office.

THE COURT: All right. All arguments must end somewhere, and I'm about to have an end. And the ruling of yesterday will stand.

* * *

[1091] (The following discussion was held in Court outside the presence of the Jury.)

THE COURT: It seems the defense had a motion?

MR. WHITE: If the Court please, on behalf of the defendant I wish to make an offer of proof.

THE COURT: Proceed.

MR. WHITE: If we called an actuary by the name of Robert Barns (sic) he would qualify as trained, experienced actuary and that using work life expectancy tables with the decedent's age at death of 37.51 years, a period of calculation to date, 12-1-76, 3.02 years, period of further earnings 22.42 years, and he would deduct income taxes, State and Federal, amount to $57,000. In his computations and if he used a six percent interest rate the pecuniary interest of the survivors would be, total a hundred—present value would be $115,325.

THE COURT: A hundred fifteen thousand what?

MR. WHITE: $325.

Two, that he could use or he could [1092] testify that he worked primarily with pension funds, eighty-one and-a-half (sic) percent interest and including a five percent increase in future earnings, his present pecuniary value to survivor would be $138,327.

THE COURT: In other words, that's eight and three-quarters percent as opposed to eight percent?

MR. WHITE: Yes, that's right.

THE COURT: That figure came to what?

MR. WHITE: $138,327.

THE COURT: Thank you.

MR. WHITE: The reason I am making this as an offer is because of your Honor's previous ruling with reference to income tax.

THE COURT: Thank you, sir.

Anything else, gentlemen?

MR. WHITE: We would ask that he would also testify that fringe benefits should not be computed because the (sic) are continuing.

THE COURT: All right.

MR. FLEISHER: Your Honor, if I may, is this offer of proof being made in lieu of the testimony of this witness?

[1093] THE COURT: Apparently so. I understand it to be that way in light of the Court's ruling with regard to income taxes.

Mr. White has very properly made this statement for the record by way of an offering of proof as opposed to attempting to bring it out before the Jury which would not be possible in light of my prior ruling.

MR. FLEISHER: This witness will not be called to testify; is that correct, Mr. White?

MR. WHITE: For that?

MR. FLEISHER: For any purpose?

MR. WHITE: Not for any other purpose.

MR. FLEISHER: This man, what was his name?

MR. WHITE: Barns (sic).

MR. FLEISHER: Mr. Barns (sic) is not being called?

MR. WHITE: He is with the Wyatt Company.

MR. FLEISHER: He is not being called in your case to testify; is that correct?

MR. WHITE: That's correct but I would call him except for the ruling that has been made.

MR. FLEISHER: Then for the record, your [1094] Honor, the plaintiff would also like to bring to the Court's attention that Mr. Barns (sic) was not listed either in the defendant's answer to interrogatories or his name was not submitted to the plaintiffs pursuant to the Supreme Court 237 production order which was served on the defendants on November 15th.

That at that time—again, for the record, pursuant to the Court's direction, a conference was held at Mr. White's office in which a list was submitted by myself giving the names of all of the plaintiffs' witnesses called to testify pursuant to that 237 notice, which included our actuary, Dr. Friedman.

At that time it was represented that only those names who appeared in defendant's answer to interrogatories would be called at time of trial, so that in addition to the Court's previous ruling as to the income tax question, the plaintiff would like to make the record clear that we are renewing an additional objection to any testimony that this witness might have given for the reasons I just stated.

MR. LANDESS: In brief response, if I may, [1095] Judge.

We, in our trial preparation, really did not plan or contemplate the use of an actuary, when we had our meeting with Mr. Fleisher in our office, as he indicated, handed us his list of witnesses which included an economist. It was at this time, since he had raised the issue, that then after reviewing the report that he furnished us from Friedman, is that his name?

MR. FLEISHER: I should add, I also, pursuant to the 237 notice at that date, on the 15th, submitted Dr. Friedman's written report to Counsel which, I believe, was dated the 1st or second week of November.

MR. LANDESS: Yes, and it was at this time that we sought the services of an economist or actuary here to review the report to see if he can assist us in the trial of the case. Prior to that we had not contemplated—

THE COURT: I think by this time the record is clear.

MR. LANDESS: Could I just, for clarity of the record, to relate back to our objection or [1096] motion in limine on the use of income tax or evidence as to income tax, just make one further brief point, and that is, Mr. Fleisher alluded to the fact that he felt this was a procedural question for the record. We feel as though this is a substantive issue of damages in which the federal cases should apply. Not procedural, substantive and I could cite for the Court Reporter some cases or if you accept the statement—

THE COURT: Let the record show your statement.

MR. LANDESS: I might also say the other day when we were discussing disclosure of witnesses we were out in the hall and we did tell Bob here, and I tell one lawyer because they are acting jointly for both plaintiffs, I mentioned we

had consulted an actuary but we did not determine whether we would use him. This was two days ago.

MR. HARRINGTON: That doesn't alleviate the problem we have when you are supposed to produce.

MR. FLEISHER: This is the first time I [1097] have been given the name of the economist. I still have not received a report. I noted Mr. White read from the report dated November 23rd which would be eight days ago.

Pursuant to the report that I submitted under the 237 notice which was on November 15th, so I again submit to the Court and for the record that in the case of economist where the plaintiff has submitted in compliance to a reciprocal production order his economist along with his written report, that the defendant was able to then come into Court some seventeen days later and say now we wish to call an economist who obviously, from the offer of proof, would attempt to rebut a certain element of damages, then I believe the plaintiff would have the right to call in rebuttal a third economist, not necessarily his own because his own has been rebutted, and I believe the defendant would have a right to reopen his cross and call a fourth economist who rebutted the third who rebutted the second who rebutted the first and when does it all end.

MR. HARRINGTON: It's not part of my case.

* * *

(Whereupon, the following proceedings occurred outside of the presence of the jury)

* * *

[1199] MR. FLEISHER: Your Honor, if I may, on the record, plaintiff Liepelt submitted Instructions Nos. 30, 31 and 32

and 33. At this time the plaintiff Liepelt will withdraw Nos. 30, 32 and 33 and in lieu submit to defendants and the Court the following:

[1200] Off the record.

(Whereupon, a discussion was had off the record.)

THE COURT: Is there any objection to Plaintiff's proposed 30?

MR. WHITE: I don't understand it. I don't think the jury will.

MR. FLEISHER: That's IPI 16014 verbatim for wrongful death, as is 30A.

THE COURT: Is there any objection?

MR. WHITE: I object to giving both of them, Judge.

THE COURT: Sir?

MR. WHITE: I object to giving both of them.

THE COURT: Both which?

MR. WHITE: On pecuniary costs.

THE COURT: You're objecting to both 16014 and 16015?

MR. WHITE: Yes.

MR. FLEISHER: They are concurrent, your Honor. 16015 describes pecuniary loss and sets out the specific elements pursuant to IPI.

MR. WHITE: Both of them?

MR. FLEISHER: Pardon?

[1201] MR. WHITE: One or the other.

MR. FLEISHER: No.

THE COURT: Any objections?

MR. WHITE: Yes.

THE COURT: Have you stated your objections?

MR. WHITE: Yes.

THE COURT: Plaintiff's Instruction 30 and 30A will be given to the jury over the objections of the defendant.

* * *

[1251] THE COURT: The same paragraph that we are dealing with here.

30 has heretofore been ruled in over the objections of the defendant, as has 30A.

Are there any more instructions for the plaintiff?

MR. NAUGHTON: 31.

MR. LANDESS: Have we seen this?

MR. NAUGHTON: Yes.

MR. FLEISHER: Yes. I submitted it yesterday.

MR. NAUGHTON: Last night. I don't know what you did with them.

MR. LANDESS: 31?

MR. FLEISHER: Right.

THE COURT: 3109 in IPI?

MR. FLEISHER: Right.

THE COURT: Is there any objection to 31?

MR. LANDESS: The objection here in part is, I believe, 3109 falls within the damage instructions for wrongful death. The 160.12 of IPI gives the comment on the use of damage

instructions and I [1252] believe the Court will see here that the 30 series is supplemented with these and then down here replaces the 130 series (sic).

THE COURT: Do you have an instruction out of the 160 series?

MR. LANDESS: I was not planning on submitting any, no, Judge. Some have been submitted previously, of course, by plaintiffs.

THE COURT: I can see no prejudice or harm coming to any party by the submission of Plaintiff's Instruction No. 31 and so will be given over objections of the defendant.

* * *

[1263] THE COURT: Thank you. Now, we'll go to 19 and, of course, 19 will be rejected for reasons argued at length in the earlier part of the trial.

MR. White: What's that?

MR. LANDESS: Taxes.

THE COURT: Income tax.

* * *

INSTRUCTIONS TO JURY

* * *

[1417] The plaintiff Kandythe Liepelt brings this action in a representative capacity by reason of her being the administrator of [1418] the estate of Delroy Liepelt, deceased. The persons she represents are the widow and next of kin of the deceased, namely, Kandythe Liepelt, Carolyn May Liepelt, Marilyn Kay Liepelt, Corey Allen Liepelt and Kyle Stanton Liepelt. They are the parties in interest in this lawsuit and in that sense are the real plaintiffs, whose damages you are to determine if you decide for the administrator of the estate of Delroy Liepelt.

* * *

[1423] If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for any pecuniary loss they have suffered and for any pecuniary loss they are reasonably [1424] certain to suffer in the future by reason of the death of the decedent.

In arriving at the amount of damages for the loss of future pecuniary benefits, you must determine the present cash value of the future pecuniary benefits the decedent's survivors were reasonably certain to receive, making allowance for the earning power of money.

To determine the pecuniary loss suffered by each survivor as a result of the death of Delroy Liepelt, the decedent, you should consider what benefits of pecuniary value, including money, goods and services, the evidence shows that the decedent customarily contributed to each survivor. You should also consider what the decedent was earning and what he would have been likely to earn in the future, in view of his earning capacity, habits of industry and thrift, his health, his age, and life expectancy at the time of his death.

You should also consider the personal expenses of decedent and other deductions from his earnings. Consider also how long each survivor would have been [1425] likely to receive pecuniary benefits from the decedent if he had lived. Consider also all other facts shown by the evidence which aid you in determining what pecuniary benefits it might reasonably be expected each survivor would have received from the decedent, if the decedent had not met his death.

Some of the survivors are the minor children of the decedent. As to these survivors, you may award an amount to compensate the children for the pecuniary value of any loss of care, attention, instruction, training, advice, and guidance the decedent would have been likely to give his children during their minority if decedent had continued to live.

The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of Delroy Liepelt.

PROPOSED JURY INSTRUCTIONS

[C-190] *Plaintiff's Proposed Instruction No. 30.*

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for any pecuniary loss they have suffered and for any pecuniary loss they are reasonably certain to suffer in the future by reason of the death of the decedent.

Source: Illinois Pattern Jury Instructions, Civil, § 160.14 (2nd Ed).

In arriving at the amount of damages for the loss of future pecuniary benefits, you must determine the present cash value of the future pecuniary benefits the decedent's survivors were reasonably certain to receive, making allowance for the earning power of money.

[C-191] *Plaintiff's Proposed Instruction No. 30A.*

To determine the pecuniary loss suffered by each survivor as a result of the death of Delroy Liepelt, the decedent, you should consider what benefits of pecuniary value, including money, goods and services, the evidence shows that the decedent customarily contributed to each survivor. You should also consider what the decedent was earning and what he would have been likely to earn in the future, in view of his earning capacity, habits of industry and thrift, his health, his age, and life expectancy at the time of his death. You should also consider the personal expenses of decedent and other deductions from his earnings. Consider also how long each survivor would have been likely to receive pecuniary benefits from the decedent if he had lived. Consider also all other facts shown by the evidence which aid you in determining what pecuniary benefits it might reasonably be

expected each survivor would have received from the decedent, if the decedent had not met his death.

Some of the survivors are the minor children of the decedent. As to these survivors, you may award an amount to compensate the children for the pecuniary value of any loss of care, attention, instruction, training, advice, and guidance the decedent would have been likely to give his children during their minority if decedent had continued to live.

The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of Delroy Liepelt.

Source: Illinois Pattern Jury Instruction, Civil §160.15 (2nd Ed).

[C-192] *Plaintiff's Proposed Instruction No. 31.*

The plaintiff Kandythe Liepelt beings this action in a representative capacity by reason of her being the administrator of the estate of Delroy Liepelt, deceased. The persons she represents are the widow and next of kin of the deceased, namely, Kandythe Liepelt, Carolyn May Liepelt, Marilyn Kay Liepelt, Corey Allen Liepelt and Kyle Stanton Liepelt. They are the real parties in interest in this lawsuit and in that sense are the real plaintiffs, whose damages you are to determine if you decide for the administrator of the estate of Delroy Liepelt.

Source: Illinois Pattern Jury Instruction, Civil §31.09 (2nd Ed).

[C-199] *Defendant's Proposed Instruction No. 19.*

If your verdict is in favor of plaintiffs, your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award.

Source: Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952); *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284 (CA 9, 1975).

VERDICT

[C-163] We, the Jury find for both plaintiffs and against the defendant. We separately assess the damages for each plaintiff as follows:

Kandythe J. Liepelt, Administratrix of the Estate of Delroy Liepelt, deceased	$775,000.00
Mack Maynard, Jr.	$ 16,500.00

(Signatures Omitted)

JUDGMENT

JUDGE HOLZER DECEMBER 3, 1976 A.D.

(CAPTION OMITTED)

[C-208] This day again come the parties to this suit by their Attorneys respectively, and whereupon the Court instructs the Clerk to open and read the Verdict of the Jury, which Verdict is as follows to wit:

"We, the Jury, find for both Plaintiffs and against the Defendant. We separately assess the damages for each Plaintiff as follows, Kandythe J. Liepelt Adm. of the estate of Delroy Liepelt deceased, in the sum of SEVEN HUNDRED, SEVENTY-FIVE THOUSAND DOLLARS ($775,000.00), and for Plaintiff Mack Maynard, Jr., the sum of SIXTEEN THOUSAND, FIVE HUNDRED DOLLARS ($16,500.00)."

Therefore, it is considered by the Court, that the Plaintiff Kandythe J. Liepelt, Administratrix, do have and recover of and from the Defendant his said damages of $775,000.00, and it is further considered by the Court that the Plaintiff Mack Maynard, Jr. do have and recover of and from the Defendant his said damages of $16,500.00, in form as aforesaid by the Jury, assessed together with his costs and charges in this behalf expended and have execution therefor.

IN THE

Circuit Court of Cook County, Illinois

COUNTY DEPARTMENT, LAW DIVISION

(CAPTION OMITTED)

ORDER

[C-302] This matter coming on to be heard on motion of defendant, NORFOLK AND WESTERN RAILWAY COMPANY; for judgment notwithstanding the verdict or, in the alternative, for a new trial, or, in the alternative, for a remittitur, and the Court having considered defendant's post trial motions and memorandum of law in support of said motions, having heard arguments of counsel, and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that defendant, NORFOLK AND WESTERN RAILWAY COMPANY's, motion for judgment notwithstanding the verdict be, and the same hereby is, denied;

IT IS FURTHER ORDERED that defendant NORFOLK AND WESTERN RAILWAY COMPANY's motion for a new trial be, and the same hereby is, denied.

IT IS FURTHER ORDERED that defendant NORFOLK AND WESTERN RAILWAY COMPANY's motion for a remittitur be, and the same hereby is, denied.

IT IS FURTHER ORDERED that there is no just reason to delay the enforcement or appeal of the above entitled cause.

ENTER: JUDGE REGINALD J. HOLZER
Feb. 25, 1977

ORDER ALLOWING CERTIORARI

Supreme Court of the United States

No. 78-1323

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

v.

KANDYTHE J. LIEPELT, ADMINISTRATRIX, etc.

ORDER ALLOWING CERTIORARI.

Filed April 16, 1979.

The petition herein for a writ of certiorari to the Appellate Court of Illinois, First District is granted.

Mr. Justice Powell took no part in the consideration or decision of this petition.

Supreme Court, U. S.
FILED
MAR 26 1979
MICHAEL RODAK, JR., CLERK

No. 78-1323

In the Supreme Court of the United States

OCTOBER TERM, 1978

NORFOLK AND WESTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1323

NORFOLK AND WESTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether a substantial federal question is presented when a State trial court, in an FELA action, excludes from the jury's consideration evidence regarding the impact of income taxes on the decedent's gross earnings?

2. Whether a substantial federal question is involved where a State trial court in an FELA action refuses to give a "cautionary" instruction that any damages awarded are tax exempt, although the jury is otherwise fully instructed as to all relevant elements in assessing damages.

REASONS FOR DENIAL OF WRIT

Contrary to petitioner's contentions, the grant of certiorari by this Court in *Rediker* v. *Chicago, Rock Island & Pacific R. Co.*, 1 Kans. App. 2d 581, 571 P.2d 70 (1977) cert. granted 435 U.S. 922 (1978) (dismissed pursuant to Supreme Court Rule 60), does not control the Court's consideration of the instant petition. The *Rediker* case is immediately distinguishable since there petitioner presented substantial constitutional questions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In the instant case petitioner wholly failed to raise or preserve any constitutional issues.

ARGUMENT

I. Petitioner has failed to raise any substantial federal question warranting this Court's consideration.

Even though the two grounds upon which petitioner seeks certiorari are interrelated and involve questions of federal income tax, the issues are separate and distinct and require individual treatment.

While a federal question arises because this is an FELA action, it is axiomatic that "the mere presence of a federal question will not permit review . . . unless that federal question is substantial." Wright, *Federal Courts* (3d Ed. 1976) p. 41. There is no substantial overriding federal interest in exerting control over the details and nuances of damage assessment procedures followed by State courts in FELA actions.

II. The overwhelming weight of authority contradicts the Petitioner's contention that the "net earnings rule" should apply in FELA cases.

A. Refusal by a State court to apply the "net earnings" rule does not raise any substantial federal question.

(1) *The alleged conflict between the circuits has no bearing on the instant case.*

Petitioner attempts to dramatize an alleged conflict amongst federal and state courts as to whether "the gross earnings" or "net earnings" rule should be considered in computing a decedent's lost earnings. Significantly, however, as noted in *Huddell* v. *Levin*, 395 F. Supp. 64, 85 (D.C. N.J. 1975), as of 1975 all but one State court followed the "gross earnings" rule invoked by the Illinois court in the case at bar. See also 63 ALR 2d 1393 and supplements thereto.

Further, the purported conflict between the federal circuits claimed by petitioner has no relevance to the instant case because decedent was not a substantial wage earner. The alleged conflict amongst the circuits is whether the "gross earnings" rule should be applied in *all cases*, or whether a modified "gross earnings" rule should be considered in select cases where a decedent's earning capacity is so substantial that taxation of those earnings would significantly reduce the amount of his lost wages. Cf. *Johnson* v. *Penrod Drilling Co.*, 510 F. 2d 234 (5th Cir. 1975) ("Gross earnings" should be applied in all cases) and *McWeeney* v. *New York, N.H. & RR*, 28 F. 2d 34 (2nd Cir. 1960) (Modified gross earnings rule applied only where income taxes would substantially reduce wages.) Only one circuit has even contemplated adoption of a "net"

earnings rule for all cases and it ultimately refused to do so on the persuasive weight of authority from other circuits which follow the modified "gross earnings" of *McWeeney*. See: *Burlington Northern Inc.* v. *Boxberger*, 529 F. 2d 284, 295 (9th Cir. 1975).

Decedent in the instant case was a common laborer employed as a railroad brakeman with an annual salary of $13,000 at the date of death. Without serious dispute, the impact of income taxes on his total earning power would have been insignificant, even in those jurisdictions which have applied a modified gross earnings rule. Had the instant case been tried in those jurisdictions, the result would have been predictably the same: the jury would have been precluded from considering future income taxes upon decedent's lost earnings in computing damages.

The alleged "conflict" is overblown by petitioner to contrive a substantial federal question where none exists.

(2) *The result in the instant case is supported by the overwhelming majority of jurisdictions which have addressed the question.*

The trial court's exclusion of evidence as to the effect of taxation of decedent's earnings was proper and just. The minimal benefit gained by permitting consideration of income tax impact, weighed against the potential for error which would result from the necessary exploration of numerous collateral matters, definitely supported the trial court's order of exclusion.

To apply the inclusionary rule, as urged by petitioner, would be an invitation to endless speculation by the jury as to the number of possible exemptions, the type and amount of deductions, the effect of tax exempt earning, tax shelters, taxes on investment earnings, as well as potential changes in all of these items over the life expectancy of

the decedent—a mass of details far afield of the jury's function of rendering a just verdict. As aptly noted by the District Court in *Huddell* v. *Levin*, supra:

> "The difficulty of predicting the future of the tax code and its applicability to unknown individual decisions of a taxpayer is compounded by the confusion between the jury's traditional role as a fact finder and the need to make legal determinations in considering tax consequences . . . Most lawyers spend a full year in law school just to familiarize themselves with basic income tax law; State judges are never exposed to federal tax issues; and even federal judges are rarely exposed to such complicated tax problems. The possibility of conflicting expert testimony extending the average trial by at least a day is not remote. Even then the trial judge and counsel, much less a lay jury, could not realistically be expected to face this task with other than utmost confusion." (95 F. Supp. at 89-90).

And in *Rodriguez* v. *McDonnell Douglas Corp.*, 51 Cal. Rptr. 399 (Dec. 1978), the court said at p. 422:

> "The less speculation that is involved in the jury's fact-finding process, the more likely will jury awards conform to the standard of fairness and justice between litigating parties."

For the foregoing reasons the overwhelming majority of courts which have addressed the question have unequivocally held that as a matter of law, logic and sound judicial policy, the measure of damages predicated on gross earnings should not be diminished by a consideration of income tax impact and have excluded such evidence. See: 63 A.L.R. 2d 1393 and supplements. The majority view on this question is eminently sound and should not be disturbed by any consideration or pronouncement by this Court.

Further the introduction of the proposed "net earnings" rule would require the introduction of other collateral considerations which a jury must necessarily take into account. If the jury may be told that future income of the decedent must be reduced to "net earnings" after taxes, then the jury should also be instructed that the reinvestment of a lump sum at a certain rate of interest would produce less on a net basis, because of the applicability of taxes. See: *McWeeney* supra, at p. 37. Further, the jury should also be instructed that any award rendered in favor of the plaintiff would be reduced by court costs and attorneys fees and other litigation expenses. Application of the "net earnings" rule would therefore open the sluice gates to a flood of collateral and extraneous matters and seriously impair the objective of a fair trial.

B. Petitioner has failed to preserve the issue of the "net earnings" rule for review.

There is no competent evidence in the instant record to justify petitioner's position that the application of the "net earnings" rule would have resulted in any significant reduction of the jury verdict. The "offer of proof" made by the attorney for the defendant merely consisted of an unsupported statement that defendant's expert would testify that there would be a reduction of $57,000 (A-35-36) in the amount of decedent's lost earnings if the impact of future taxation was considered. No testimony was offered with respect to a number of variables, including the type and number of exemptions and deductions or the applicable rates of taxation over the decedent's life expectancy, to substantiate this conclusion. Absent such data, the trial court was unable to determine the competency of the income tax figures proffered by defendant, and, therefore, under State law, correctly rejected the offer of proof. *Austin Liquor Mart, Inc.* v. *Dept. of Revenue,* 18 Ill. App. 3d 894, 906, 310 N.E.2d 719 (1974); *Hession* v. *Liberty Asphalt Products Inc.,* 93 Ill. App. 2d 65, 71, 235 N.E. 2d 17 (1968).

Since the petitioner's entire argument is predicated on the erroneous assumption that the "net earnings" rule is to be applied in *all* FELA cases without considering the income tax bracket of the plaintiff, and since the record in the instant case is totally devoid of any evidence which indicates that the application of the "gross earnings" rule operated to prejudice the petitioner, there is no basis for the claim that any question of importance is raised by the instant case.

III. Refusal of a cautionary instruction on the tax exempt status of the damage award was proper and presents no substantial federal question.

Petitioners fail to raise any substantial question worthy of this court's attention in their claim that the State trial court erred in refusing their tender of a cautionary instruction that the damages awarded would be tax exempt under 26 U.S.C. §104(a)(2).

Although the measure of damages in an FELA case may be determined by federal law, the form and content of jury instructions are matters of procedure in which the law of the forum controls.

Petitioner's claim rests on the unsupported premise that in rendering an award of damages the jury will assume that the award is taxable and augment its award to compensate for the tax factor. Such presumption is speculative and is negatived by the fact that the jury was thoroughly instructed as to the proper factors to be weighed in assessing damages which will properly compensate the plaintiff.

To open the door slightly for a cautionary instruction upon taxes is to open it wide for a multitude of cautionary instructions on other matters whose limit is bounded only the fertile imagination of trial counsel. *Hall* v. *C&NW Ry. Co.*, 5 Ill. 2d 135, 150-52 (1955).

It is noteworthy that most jurisdictions which considered these issues have held that the failure to give a cautionary instruction rested in the sound discretion of the trial court and was not reviewable, let alone reversible error. See 63 A.L.R. 2d 1393; *Nichols* v. *Marshall*, 486 F. 2d 791 (10th Cir. 1973); *Elston* v. *Shell Oil Co.*, 481 F. 2d 608 (5th Cir. 1973); *McWeeney* v. *New York N.H. & H.R.*, supra,; *New York Central RR* v. *Village*, 52 F. 2d 522 (6th Cir. 1958). Only two federal courts have required that an instruction be given and that requirement was prospective only. See *Domeracki* v. *Humble Oil & Refining Co.*, 443 F. 2d 1245, 1251 (3rd Cir. 1971) cert. denied, 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed. 2d 165 (1971), *Burlington Northern, Inc.* v. *Boxberger*, 529 F. 2d 284, 297 (9th Cir. 1975). Further, there are no reported cases where the judgment of the trial court has been reversed because of the refusal to give this cautionary instruction.

No evidence exists in the instant case that the jury improperly overcompensated plaintiff for an "imagined" tax. Plaintiff's expert testified that a conservative estimate of the pecuniary loss resulting from decedent's death would be $302,000.00 (A. 190). That figure remains uncontroverted since defendant failed to present any countervailing evidence by an expert. The jury was also instructed that they could award plaintiff's children for the loss of the care, attention, instruction, training, advice and guidance of the decedent. The instant award of $775,000 was demonstrably not excessive nor indicative of the jury's attempt to inflate the award to compensate for an im-

agined tax. *Arguendo,* even if the damage award was deemed excessive, standing alone such issue would hardly warrant certiorari by this court.

IV. Consideration of tax consequences would contravene the purpose behind the tax exempt status of personal injury award.

The thrust of petitioner's contention is an oblique attack upon the tax exempt status of personal injury awards. The rationale for protecting the exempt status was pertinently mentioned by the District Court in *Huddell,* supra:

> "The decision of Congress not to tax personal injury awards obviously results in a benefit equal to the amount of taxes that would otherwise be paid to the Government. If defendants' argument is accepted, they will receive that benefit by being able to avoid payment of that portion of lost wages which it would have otherwise been the plaintiff's responsibility to pay as income taxes. If the majority rule is accepted, injured plaintiffs will receive the benefit. The court can devine no societal purpose that would be furthered by awarding wrongdoing defendants with the benefit of this Congressional largesse. A societal purpose would be served by benefiting innocent victims of tortious conduct. Indeed, since the victims' chances of needing public relief are thereby diminished, this concern would be greater, not less, in the case of death, where the loss of earning capacity is total. This court therefore concludes that Congress, as will all exemptions under §104, '. . . intended to relieve a taxpayer who has the misfortune to become ill or injured . . .' " (395 F. Supp. at 87).

A cautionary instruction would operate to pass the remedial benefit to the tort feasor rather than to the injured taxpayer as was intended by Congress. As the Court noted in *Hall,* supra:

"And if the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified." (5 Ill. 2d at 152).

CONCLUSION

For all the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1323

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Petitioner,

vs.

Kandythe J. Liepelt, Administratrix
of the Estate of Delroy Liepelt, Deceased,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

REPLY BRIEF

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REPLY BRIEF

Introduction

The most noteworthy aspect of respondent's Brief in Opposition (Opposition) is that it does not seriously challenge any of the grounds petitioner has advanced in support of its application for certiorari.

First, and most significantly, the Opposition does not deny that there is, in cases brought under the FELA, a conflict among the state courts and among the federal courts both on the question whether income taxes should be deducted in computing a decedent's lost earnings and also on the question whether a court may refuse to advise a jury that a claimant's award will not be taxed. And apart from making the wholly

unrealistic claim that these federal questions are "insubstantial", respondent does not present any reasons why this Court should not resolve these conflicts. Indeed, by failing to deny either that the questions presented have enormous practical importance in large numbers of lawsuits filed each year or that most major suits will, until this Court acts, be filed and tried in those jurisdictions which follow the Illinois rules, *see* Petition for Certiorari at 17-18, the Opposition underscores that an authoritative national decision is urgently needed.

Second, the Opposition does not dispute that the Illinois courts' rulings required the jury to award respondent money that decedent would have paid out in taxes and encouraged it to inflate the verdict to compensate for an imagined tax and that, therefore, the decision below is not in accord with the well established rule that damages in a FELA action is to be the amount the claimant could reasonably have expected to have been applied to his benefit if the accident had not occurred. *See Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485 (1916); *Norfolk & Western Ry. Co.* v. *Holbrook*, 235 U.S. 625, 629 (1915). Although the Opposition apparently is arguing that the damages rulings of the Illinois courts are correct, none of its specific arguments even address the standard for FELA damages prescribed in *Kelly* and *Holbrook*.[1]

For example, respondent's primary defense of the gross earnings test is that a deduction for the taxes the decedent would have paid somehow bestows a benefit on the wrongdoing defendant that Congress intended to confer upon the plaintiff. Opposition at 7-8. This argument simply ignores that the measure of damages under the FELA is the amount required to place a plaintiff in the same position he would

[1]Curiously, the case respondent relies upon, *Huddell* v. *Levin*, 395 F. Supp. 64 (D.C.N.J. 1975), involved state tort law, not the FELA.

have occupied had the accident never occurred. The cost to the defendant of providing the compensation necessarily is irrelevant, and the suggestion that a net earnings test could confer a benefit on a defendant is simply untenable.

Respondent's other arguments in defense of the rulings below were addressed in the Petition for Certiorari.

Although respondent's Opposition does not challenge the reasons petitioner advanced in support of granting certiorari, the Opposition makes two arguments which, if tenable, would affect this Court's decision. Neither, however, is remotely tenable.

I. Petitioner Has Properly Preserved Its Objection to the Gross Earnings Rule and This Case Squarely Presents that Question and All Its Variations.

Petitioner makes two interrelated arguments to the effect that petitioner's claim that the gross earnings test violates the FELA is somehow not before the Court.

First, it is contended that petitioner did not preserve its right to appellate review of this claim because it failed to show at trial, by way of a proper offer of proof, that the application of a net earnings rule would have resulted in a significant reduction in the size of the verdict. Although this contention is based on a misrepresentation of the trial record, the short answer to respondent is that the Illinois Appellate Court disposed of this federal question on the merits. *See* A22-23. This Court has repeatedly held that "there can be no question of the proper presentation of a federal claim when the highest state court [has] passe[d] on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959); *accord Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *see generally* R. Stern & E. Gressman, *Supreme Court Practice* ¶3.28, at 222–24 (5th Ed. 1978).

But even if the Court were to deviate from established principles and inquire into whether the point was preserved, respondent's argument would have to be rejected. The claim proceeds from the premise that there is no evidence in the record concerning the effect taxation would have had on petitioner's future earnings because the trial judge, in respondent's view, "*rejected* the offer of proof" concerning the testimony of Robert Barnes on the ground the offer lacked specificity. Opposition at 6–7 (emphasis supplied). This premise is simply false. The record unequivocably shows that, while the trial court kept from the jury Dr. Barnes' *testimony* on the authority of his earlier rulings concerning the treatment of income taxation, the trial judge accepted *the offer of proof, see* A35–36, regarding it as entirely adequate to preserve petitioner's claim.[2] In any case, respondent having made the same argument in the lower court, *see* Brief for Plaintiff—Appellee at 60, and the Illinois Appellate Court having nevertheless reached the merits, it is clear that it too regarded the offer of proof as fully adequate, and that respondent's assertion that the decision below rests on an independent adequate state procedural ground is frivolous.

Second, in a related vein, respondent maintains that petitioner may not rely upon those cases that require a deduction for income taxes only when taxation would have significantly reduced the amount of the wage earner's disposable income, *see Burlington Northern, Inc.* v. *Boxberger*, 529 F. 2d 284, 290 (9th Cir. 1975) (discussing cases), because her decedent would not have paid out a substantial amount of his income in taxes. Opposition at 4. This argument both

[2]The cases respondent cites—*Austin Liquor Mart, Inc.* v. *Dept. of Revenue*, 18 Ill. App. 3d 894, 906, 310 N.E. 2d 719 (1974); *Hession* v. *Liberty Asphalt Products, Inc.*, 93 Ill. App. 2d 65, 71, 235 N.E. 2d 17 (1968)—are both cases in which the moving party had failed to attempt to make an offer of proof, so both are clearly inapposite.

ignores the record—which showed that respondent's decedent would have paid out $57,000 in taxes and that consideration of the effect of taxation would have reduced respondent's estimated pecuniary loss from $302,000 to some $115,000, *see* A35—and further misstates the law of those jurisdictions that follow this variation on a net earnings approach. These courts hold that inquiry into the effect of taxation is required whenever the projected annual earnings exceed $15,000 (and possibly whenever they exceed $11,500). *See Burlington Northern, Inc.* v. *Boxberger, supra*, at 290 (summarizing cases). Because Liepelt's *projected* (i.e. post-trial) earnings ranged from $16,800 to $36,000, the ruling below plainly would have been held erroneous by these net earnings jurisdictions.[3]

II. The Questions are Substantial

Although respondent repeatedly refers to petitioner's federal claims as being "insubstantial", such a characterization is preposterous. The federal questions petitioner has presented are neither devoid of merit nor plainly foreclosed by prior decisions of this Court. *See* R. Stern & E. Gressman, *supra*, ¶3.25, at 208. On the contrary, as numerous federal courts and several state courts have concluded, established federal principles of damages compel the adoption of petitioner's claims.

To the extent respondent is contending that there is no federal interest in the correct resolution of these questions, that argument is conclusively refuted by this Court's own actions. The single overriding issue in this case is whether the Illinois courts' ruling either required—by excluding all

[3]The Illinois Appellate Court, moreover, plainly recognized as much. If it had agreed with respondent's argument—which was made below, *See* Brief of Plaintiff—Appellee at 59–60—surely it would have decided the case on a narrow ground rather than aligning itself with the gross earnings jurisdictions.

evidence of the taxes decedent would have paid—or impermissibly encouraged—by refusing to instruct the jury that awards are tax free—a verdict which overcompensated respondent in violation of the established principle that FELA damages should be the amount the claimant lost as a result of the accident—and no more. *See Norfolk & Western Ry. Co.* v. *Holbrook*, *supra*. This Court has, in the past, required states to follow practices that will ensure that no such overcompensation occurs, *see Chesapeake & Ohio R. Co.* v. *Kelly*, *supra*, and these cases dispose of respondent's assertion that the *"content"* of FELA jury instructions are "matters of procedure" which may be governed by the Forum's law without threatening any federal interest. Opposition at 2, 7.

The grant of certiorari in *Rediker* v. *Chicago, Rock Island & Pacific R. Co.*, 1 Kan. App. 2d 581, 571 P. 2d 70 (1977), *cert granted*, 435 U.S. 922 (No. 77-1000), is a recent illustration of the point. Respondent's implication to the contrary notwithstanding, *Rediker* involved the identical statutory issues petitioner has submitted, this Court having there not limited its grant to a related constitutional issue which was referred to in that petition.[4]

[4]Contrary to respondent's assertion, petitioner is not claiming that *Rediker* "controls the Court's consideration of the instant petition." Opposition at 3. *Rediker* does show, however, the questions presented here were regarded by this Court as worthy of plenary consideration last term, and for the reasons set forth in the Petition in this case, these same questions are as much or more worthy of certiorari today.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, certiorari should be granted.

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Lord Campbell's Act, 9 and 10 Victoria c.93	16–17
26 U.S.C. §61	2, 32
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28 U.S.C. §1257	2
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ADMINISTRATIVE RULINGS	
Rev. Rul., 54-19, 1954-1 Cum.Bull. 179 (1954)	32, 34
Rev. Rul., VII-2 Cum.Bull. 123 (1928)	32
20 Treas. Dec. Int. Rev. 457 (1918)	31
MISCELLANEOUS	
Alderman, What the Supreme Court Has Done to the Old Law of Negligence, 18 Law & Contemp. Prob. 110 (1953)	23
Annot., 63 A.L.R.2d 1393 (1959) and later cases in A.L.R.2d Supp. Service	14, 35
Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?, 14 DePaul L.Rev. 320 (1965)	23, 36
Feldman, Personal Injury Awards: Should Tax Exempt Status Be Ignored?, 7 Ariz.L.Rev. 272 (1966)	36
F. Harper & F. James, Law of Torts (1956)	23, 25–27, 31, 35

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Henderson, Some Recent Decisions on Damages: With Special Reference to Questions of Inflation and Income Taxes, 40 Ins. Counsel J. 423 (1973)	36
Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St.L.J. 384 (1956)	17
H. R. Rep. No. 1386, 60th Cong., 1st Sess., (1908)	17
H. R. Rep. No. 767, 65th Cong., 2d Sess., (1918)	31
Illinois Pattern Jury Instructions, Civil (2nd Ed. 1971)	37
Internal Revenue Service, Statistics of Income 1976: Individual Tax Returns Publication 79 (4-79) (1979)	28
Knachel, Jury Instructions on Tax Exemptions in Personal Injury Cases, 6 Cleve. Mar. L.Rev. 71 (1957)	38
C. McCormack, Law of Damages (1935)	16
Morris, Should Juries in Personal Injury Cases Be Instructed that Plaintiff's Recoveries Are Not Income Within the Meaning of the Federal Tax Law?, 3 Defense L.J. 3 (1958)	36
Morris & Nordstrom, Personal Injury Recoveries and the Federal Income Tax Law, 46 A.B.A.J. 274 (1960)	24, 36, 40
National Railway Labor Conference, Wage Statistics, Annual 1977, Non-Operating Employees (1978)	33

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National Railway Labor Conference, Wage Statistics, Annual 1977, Operating Employees (1978)	33
Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St.L.J. 212 (1958)	23, 27, 36
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Note, 42 Geo.L.J. 149 (1953)	36
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Note, 11 Wash. & Lee L.Rev. 66 (1954)	36
Restatement of the Law 2d, Conflict of Laws (1969)	18
Sen. Rep. No. 460, 60th Cong., 1st Sess., (1908)	15, 16
Stripp & Rowland, Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases—Recent Developments, 36 Ins. Council J. 231 (1969)	24, 36

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1323

Norfolk and Western Railway Company,
Petitioner,

vs.

Kandythe J. Liepelt, Administratrix
of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District, First Division, is reported at 62 Ill.App.3d 653, 378 N.E.2d 1232 (1978), and it appears at pages A21–A26 of the Petition For Certiorari. The order and mandate of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal, unreported, appears at pages A27–A28 of the Petition For Certiorari.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, First Division, was entered on July 5, 1978. Petitioner's timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on November 30, 1978. The

Petition for Certiorari was timely filed on February 26, 1979 and was granted on April 16, 1979. (A 91) The jurisdiction of this Court is based on 28 U.S.C. §1257(3).

STATUTES INVOLVED

35 Stat. 65, *as amended,* 45 U.S.C. §51.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

26 U.S.C. §61(a), Int. Rev. Code of 1954, §61(a).

"[G]ross income means all income from whatever source derived. . . ."

26 U.S.C. 104(a)(2), Int. Rev. Code of 1954, §104(a)(2).

"[N]ot in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expense) for any prior taxable year, gross income does not include—. . . (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . ."

QUESTIONS PRESENTED

The measure of damages in wrongful death actions under the Federal Employers' Liability Act (FELA) is the amount that the decedent's statutory beneficiaries could reasonably have expected to have been applied to their benefit if the accident had not occurred. This case presents two questions concerning whether a court's refusal to permit the trier of fact to consider the effect of income taxation violated this basic principle of damages:

1. Whether, in a case in which income taxation would have substantially reduced the income available to the decedent if the accident had not occurred, a court must allow evidence of the income taxes that the decedent would have paid on his estimated past and future lost earnings and require the jury to reduce the award to account for the effects of taxation?

2. Whether, in view of the likelihood that a jury otherwise would erroneously assume that a damages award is taxable and thus inflate its verdict to assure full compensation after payment of an imagined tax, the trial court in a FELA action should permit the jury to be informed that, under existing tax laws, the damages award is not subject to income taxation?

STATEMENT OF THE CASE

In November, 1973, Delroy Liepelt, an Ohio resident, was killed in a collision at Wyatt, Indiana, while working as a fireman for the petitioner railway company. Respondent, the

administratrix of his estate, brought this action under the FELA in the Circuit Court of Cook County, Illinois, to recover the monetary damages that she and Liepelt's children had incurred as a result of his death.

At trial, respondent introduced evidence both of petitioner's negligence—which is no longer in issue[1]—and of the pecuniary loss that she and decedent's children had incurred because of his death. The only evidence concerning the dollar value of the pecuniary loss suffered by decedent's wife and children was supplied by respondent's witness, Dr. Bernard Friedman, an economist. (A46–A61). Liepelt had been earning approximately $13,000 per year at the time of his death in 1973, and his annual earnings as a railroad fireman would have increased to approximately $16,800 by the date of the trial in 1977. (A43–A44, A52–A53). Friedman testified that Liepelt had had a life expectancy of a little over 34 years at the time of his death in 1973 (A46), and on the basis of the historical wage tendencies of the preceding 20 years (which reflected inflation) (A47–A50), Friedman projected that decedent's earnings would have increased in the future at a rate of at least 5% per year (A54–A55), thus reaching an annual estimated salary of some $51,600 by the date of decedent's projected retirement in the year 2000.[2]

[1]The fatal accident occurred because the train on which decedent was working switched onto a siding track and collided with several loaded freight cars. Although evidence showed that vandals broke the lock on the switch and thereby caused the accident, the court below held that there was sufficient evidence to permit the jury to find that vandalism was not the sole cause of the accident. (Petition for Certiorari, at A5, A18–A19).

[2]Witness Friedman also calculated that petitioner's contributions to health insurance, disability plans, and so forth had a value of 5% of decedent's gross pay, so he increased the lost earnings figure by this 5%. (A54–A55).

The second major element in witness Friedman's computation consisted of determining the value of the chores decedent would have performed around his house over the period of his life expectancy if he had survived. After stating that it was difficult to assign a monetary value to these (A55), Friedman testified that decedent's household services would, for any given year, have had a value equal to 9% of his annual gross income. (A55).

The final element in the computation consisted of a determination of the amounts decedent would have spent on himself over his life time. On the basis of the prior testimony, Friedman estimated that Liepelt had spent approximately 10% of gross earnings on himself during the years immediately prior to his death. Friedman, however, projected, that these amounts would have increased over his lifetime to 25% and later to 50% of his gross earnings and that the "weighted average" for those personal expenditures would have been 31% of his gross income for the later years of his life. (A55–A56).

To determine the monetary value of the net pecuniary loss to decedent's beneficiaries, witness Friedman first discounted lost future benefits to their present value, using an interest rate of 7%.[3] He then added the present value of Liepelt's past and projected gross compensation to that of his household services and then subtracted the value of the amounts Liepelt would have spent on personal consumption, producing the amount of $302,000. (A54). Finally, although there had been testimony concerning the care, guidance, instruction,

[3]Friedman had earlier testified that, in light of the historical evidence and the present tendencies, 7% was an appropriate rate. (A51).

and training that Liepelt would have provided his children if he had not been killed (A17–A26, A28–A31), witness Friedman testified that this figure of $302,000 did not include any amount to reflect these losses because he could not assign any monetary value to them, there being no statistical basis for doing so. (A59–A60).

Prior to calling witness Friedman, respondent's counsel had made an oral motion to prohibit petitioner from mentioning the subject of income taxation in its cross examination. (A44). When counsel for petitioner asked to question witness Friedman as to whether he had taken into account in his computations that any amount paid in damages is not subject to income tax, the trial judge prohibited the questioning, saying that, under the decisions of the Illinois Supreme Court, any reference to income taxation in the presence of the jury not only would be improper but would require "granting a motion for a mistrial." (A61–A63).

After witness Friedman was excused, petitioner moved for a mistrial on two related grounds. First, petitioner again argued that the jury should be informed that any damages awarded would not be taxable. Second, petitioner urged that it should be allowed to introduce into evidence the amounts of decedent's gross earnings which would have been paid out in income taxes and which, therefore, could not have been used to support his beneficiaries if the fatal accident had not occurred. The trial judge, however, reaffirmed the earlier ruling that any reference to income taxation was impermissible. (A63–A75).

In light of the trial court's rulings, petitioner could not, during the presentation of its case, place before the jury any evidence concerning the effect of income taxation on either the award or the estimated earnings of the decedent. However, petitioner did make an offer of proof that, but for the trial judge's rulings, petitioner would have called as a witness an actuary, Dr. Robert Barnes, who would have testified that in determining the pecuniary loss to decedent's survivors, he would have reduced the decedent's lost earnings by $57,000 for income taxation during the period from 1973 to 2000 and that, using a discount rate of 6%, he would have arrived at a net pecuniary loss of $115,325. The offer of proof further provided that if Dr. Barnes had assumed a 5% annual increase in future earnings, he would have used a discount rate of 8¾% and arrived at a net pecuniary loss of $138,327.[4] (A75–A76).

At the close of the evidence, petitioner requested that the judge instruct the jury that its award would not be taxed and that no amount should be added to the award on account of taxation, but the court refused, relying on its earlier rulings. (A82, A87). In his instructions to the jury, the judge stated that it must "fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for [their] pecuniary loss[es]." (A83). The jury was told that in doing so it should determine what benefits the decedent might reasonably have been expected to have contributed to each beneficiary if the decedent had not met his death. (A84). In making that latter determination, the jury was instructed to consider "what the decedent was earning and what he would have been likely to earn in the future" and also "the personal expenses of decedent and other deductions from his earnings." (A83–A84). The judge further instructed that the jury could compensate decedent's children for loss of guidance but could not award any sum for "grief or loss of

[4]The trial judge stated that, in light of his earlier rulings, it would not have been possible to place this information before the jury, but that the offer of proof was "very properly made." (A76).

society and companionship." (A84). The jury returned a verdict of $775,000 (A88), and judgment was entered in that amount (A89, A90).

Petitioner appealed to the Illinois Appellate Court, First District, First Division. Petitioner there contended that the income tax related rulings of the trial court constituted reversible error. First, petitioner urged that where, as in this case, taxation would have significantly reduced a decedent's disposable income, it was a violation of the FELA to refuse to permit the introduction of evidence of the amount of income taxes that would have been paid. Second, petitioner contended that the FELA required that the jury be told that the damages awarded a plaintiff are not subject to taxation. The Illinois Appellate Court held against petitioner on both points, stating in its opinion:

> "Defendant also claims as error the trial court's refusal to instruct the jury as to the nontaxability of a damage award; to allow cross-examination of plaintiff's economist as to the nontaxability of an award; and, to allow defendant to introduce evidence as to the effects of income taxes on the decedent's future earnings. Numerous federal cases have been cited by defendant and *amicus* American Trial Lawyers Association. From a review of these cases it is apparent that the Courts of Appeals differ on the question of whether it is proper to instruct the jury as to the nontaxability of an award or to allow evidence as to the effects of taxation on future earnings. Compare *Burlington Northern Inc.* v. *Boxberger* (9th Cir. 1975), 529 F.2d 284, with *Johnson* v. *Penrod Drilling Co.* (5th Cir. 1975), 510 F.2d 234, *cert. denied*, 423 U.S. 839.
>
> "The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that Court we will follow the decisions of our own supreme court in *Raines* v. *New York Central R.R. Co.*, (1972), 51 Ill.2d 428, 430, 283 N.E.2d 230, *cert. denied*, 409 U.S. 983, and *Hall* v. *Chicago & Northwestern Ry. Co.* (1955), 5 Ill.2d 135, 149–52, 125 N.E.2d 77, cited in *Saunders* v. *Norfolk & Western Ry. Co.* (1977), 54 Ill.App.3d 307, 316, 369 N.E.2d 518. These decisions hold that it is not error to refuse to instruct a jury as to the nontaxability of an award. Based on these decisions we also conclude that it is not error to exclude evidence of the effect of income taxes on future earnings of the decedent. These contentions are therefore rejected." (Petition for Certiorari A22–A23).

After the Appellate Court denied petitioner's Application for a Certificate of Importance, petitioner filed a Petition for Leave to Appeal with the Illinois Supreme Court which made the same arguments concerning the consideration of income taxation that had been rejected by the Illinois Appellate Court. That Petition was denied by the Illinois Supreme Court on November 30, 1978. (Petition for Certiorari A27–A28). A timely petition for a writ of certiorari was filed on February 26, 1979, and this Court granted the petition on April 16, 1979. (A91).

SUMMARY OF ARGUMENT

Consistent with the terms and objectives of the Federal Employers' Liability Act, this Court has long held that damages in wrongful death actions brought under the Act are limited to the value of the pecuniary loss that the decedent's dependent relatives suffered by reason of his death. *Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 68–74 (1913). Employers, like petitioner, thus have a federal right to have FELA damages computed under a method that will provide the FELA claimants with full compensation for their losses, *but no more*. *Gulf, Colorado & Santa Fe R. Co.* v. *McGinnis*, 228 U.S. 173, 176 (1913). The rulings below of the Illinois courts violated this right in two separate respects.

First, the Illinois courts' refusal to permit the introduction of evidence of the substantial income taxes the decedent would have paid on his estimated gross earnings guaranteed that the claimants received substantially more than the value of the loss they suffered.

Wrongful death damages are intended to compensate the decedent's relatives for the loss of financial support from the decedent. Accordingly, it is an essential part of the computation of these damages that a deduction be made from the decedent's gross earnings for all amounts that the decedent would not or could not have contributed to those beneficiaries. *Kansas City Southern Ry.* v. *Leslie*, 238 U.S. 599, 604 (1915). Plainly, the taxes the decedent would have paid on his earnings could no more have been used to support his wife and children than could, for example, the amounts decedent would have spent on himself. So just as the FELA requires a deduction for the amount of a decedent's personal expenditures, so too it must require a deduction for the taxes he would have paid on his earnings. To require a jury to award these sums to the respondent is, quite simply, to confer a windfall on the claimant and to contravene the principle that FELA damages are to be compensatory, not punitive.

The arguments advanced to support the Illinois practice of awarding wrongful death claimants the taxes the decedent would have paid on his earnings are all unpersuasive. The contention that the effects of taxation on future earnings are too speculative to be estimated by a jury is wholly unrealistic. Income taxes have been a significant fact of life for the average wage earner for decades, have been in effect since decedent's death in 1973, and the continuation of income taxation is as certain as any of the other factors involved in the determination of the value of a decedent's beneficiaries' loss.

Indeed, in light of the instability of family relationships and the possibility of death from natural causes, predictions concerning future taxation involve less speculation than those other predictions inherent in a determination of the support a decedent would have provided his dependent relatives if he had survived. Nor can it plausibly be argued that the determination of tax liability is too difficult for a jury. The rule limiting damages to the value of losses sustained already requires far more difficult computations—the reduction of the award to present value, for example—and juries routinely make more complicated determinations in other contexts. Because nearly every juror will have had personal experience computing tax liability, it is certain that, with the aid of such expert testimony as may be received, juries will be equal to the task of adjusting the size of the award to account for taxation.

Nor is there any merit to the suggestion that refusal to consider income taxation is justifiable because it will be offset by two factors juries do not consider: attorney fees and future inflation. As to inflation, its effects were taken into account here, for the jury was told that half of the projected increases in decedent's future wages would be adjustments for inflation. As to a plaintiff's attorney fees, these not only have no relevance to the measure of FELA damages, but courts are precluded, absent specific legislative guidance not present in the FELA, from allowing a jury to include in the award any amount to reimburse the plaintiff for these litigation costs. *See Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247–250 (1975).

The claim that Internal Revenue Code §104(a)(2) impliedly repealed the rule limiting FELA wrongful death damages to losses sustained is untenable. Apart from the fact that §104(a)(2) is inapplicable to wrongful death awards, all this statute does is provide that after an award is determined

according to traditional damage principles, it will be tax free. It has nothing whatsoever to do with the measure of tort damages.

Logic and fairness thus require a rule making the amount of a decedent's income tax liability a relevant consideration. Here, petitioner demonstrated that income taxation would have had a significant effect on the decedent's income. Whatever might be the appropriate rule in cases in which the impact of income taxation would have been less substantial, there is no basis whatsoever for a rule precluding consideration of income taxes where, as here, it would have substantially reduced the decedent's disposable income. The exclusion of the evidence of income tax liability thus requires a reversal.

Second, the Illinois courts' refusal to permit the jury to be told that its award would be tax free created a separate and entirely independent risk that the award, in this case, overcompensated respondent.

The jury was here instructed that it was to "fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for their pecuniary loss[es]." Because a jury could easily interpret this instruction as a directive to ensure that the award will provide the claimants with such an amount of *disposable* income as will fully compensate them, a jury will, in following this instruction, be concerned with the question whether the award will be taxed.

When the court refuses—as it did here—to allow the jury to be advised that its award will not be taxed, it creates a significant risk that the jury will award the claimants not only the amount of their losses but also, in addition, the amount of taxes that would have been paid on the award if it had

been taxable. For absent instructions to the contrary, the jury will almost certainly assume that a wrongful death award, like all other receipts of money, will constitute income to the recipient that will be taxed in the year received. Because it is probable it will also want the beneficiaries to *receive* full "after tax" compensation, it is very likely the jury will add to the award an amount that will make it big enough to ensure full compensation after payment of an imaginary tax.

The facts of this case suggest that precisely this occurred here, for respondent received an award of $775,000 after her own expert testified that the net pecuniary loss to decedent's beneficiaries was $302,000 plus whatever value was assigned to lost care and guidance. Because there was no reason whatsoever not to have instructed the jury that its award was tax free and because the failure to give this instruction created a significant risk that the jury would have overcompensated the claimant, the principles that govern FELA actions compel the reversal of the judgment on this ground. *See Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 68–74 (1913).

ARGUMENT

Although our Nation has had a graduated income tax since 1913, the question of the treatment of income taxation in measuring tort damages had been largely an academic one until comparatively recently. In the first half century of income taxation, it was the rare case in which resolution of these tax questions would have had a significant effect on the size of any claimant's judgment. Employees' wages were generally too low to be taxed, and even when subject to taxation, the amounts involved were so minimal that consideration of income taxation was unlikely to be a major factor in the computation of damages awards.

When these questions were first presented in state and federal courts in the 1940's and early 1950's, the initial judicial reaction was thus adverse: courts believed that the impact of taxation simply could not be so great as to warrant complicating a trial, even slightly, on its account. But those holdings, in many courts, proved short lived. In recognition of the facts that wages have increased steadily, without any corresponding upward adjustment in tax schedules, and that taxation thus has become a significant factor for nearly every wage earner, these courts began analyzing the issue under traditional principles of damages and concluded that income taxation had to be taken into account in computing tort damages.[5]

This case is before this Court because there are courts, like those of Illinois, which have refused to deviate from prior holdings and which continue to hold that income taxation is an improper consideration in any case based on negligence.[6] In this brief, petitioner will demonstrate that the refusal to permit consideration of the effects of income taxation in actions arising under the FELA violates the principles that have always governed the determination of FELA damages. In the first section of this brief, petitioner will show that it

[5] *See, e.g., British Transport Comm'n v. Gourley,* [1956] A.C. 185, 3 All. E.R. 796, *overruling Billingham v. Hughes,* [1949]. 1 K.B. 643, 9 All. E.R. 684; *Burlington Northern, Inc. v. Boxberger,* 529 F.2d 284 (9th Cir. 1975), *distinguishing Southern Pacific Co. v. Guthrie,* 186 F.2d 926 (9th Cir. 1954); *LeRoy v. Sabena Belgian World Airlines,* 344 F.2d 266, 276 (2d Cir. 1965), *overruling sub silentio Stokes v. United States,* 144 F.2d 82, 87 (2d Cir. 1944); *Dempsey* v. *Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), *overruling Hilton* v. *Thompson,* 360 Mo. 177, 227 S.W.2d 675 (1950).

[6] *See, e.g., Boston & Maine R. R. v. Talbert,* 360 F.2d 286, 291 (1st Cir. 1966); *Chicago & N.W. Ry. Co. v. Curl,* 178 F.2d 497, 502 (8th Cir. 1949); *Rediker v. Chicago, R.I. & P.R.R.,* 1 Kan.App.2d 581, 571 P.2d 70 (1977), *cert granted,* 435 U.S. 922 (1978) dismissed pursuant to S. Ct. Rule 60; *see generally* Annot., 63 A.L.R.2d 1393, 1398 (1959) and later cases in A.L.R.2d Supp. Service.

has a federal right to have the FELA damages it pays determined under a method that will produce an award that is limited to the value of the claimant's losses. In the second and third sections of the brief, petitioner will show that this right was violated in two respects in this case. First, by excluding all evidence of the taxes decedent would have paid on his estimated gross earnings, the Illinois court required the jury to award respondent amounts which never would have been contributed to decedent's wife and children if there had been no accident. Second, by refusing to permit the jury to be told that its award would not be taxed, the Illinois court created a significant risk—which obviously came to fruition in this case—that the jury would award respondent not only the value of the beneficiaries' losses, but also, in addition, the amount of the taxes that would have been payable on the award if it had not been tax free.

I. THE FEDERAL EMPLOYERS' LIABILITY ACT REQUIRES THAT STATE, AS WELL AS FEDERAL, COURTS "STRICTLY LIMIT" RECOVERIES IN WRONGFUL DEATH ACTIONS TO THE VALUE OF THE DECEDENTS' BENEFICIARIES' LOSSES

The Federal Employers' Liability Act was enacted to redistribute the losses suffered by railroad employees as a result of negligent acts of their employers or fellow employees.[7] It

[7] Prior to the Act, the common law doctrines of assumption of risk, contributory fault, and the fellow servant rule had drastically limited the instances in which a railroad could be held liable to any of its employees in negligence. *See* Sen. Rep. No. 460, 60th Cong., 1st Sess. 1-3 (1908). The Act either restricts or abolishes each of these common law defenses, thus expanding the conditions under which railroads may be held liable in damages. In addition to granting

(footnote continued on next page)

grants railroad employees, and their beneficiaries, a federal right to recover "damages" from their employers for injuries or deaths caused, "in whole or in part [by] the negligence of any of the [railroad's] officers, agents, or employees." 35 Stat. 65, *as amended* 45 U.S.C. §51. Although the FELA does not explicitly define "damages" in its wrongful death actions,[8] the Act's terms and history establish that such damages must be assessed in accordance with the fundamental principle that damages in actions based on negligence be limited to such a sum as will compensate the claimants for their losses.[9] *See* C. McCormack, *Law of Damages* 560 (1935).

Congress modeled the FELA's wrongful death provisions on the English wrongful death statute known as Lord Campbell's

injured employees a right of recovery for negligently inflicted injuries, the Act extends railroads' liability to cases of death. It provides that the personal representative of a deceased employee may bring an action to recover on behalf "of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee." 35 Stat. 65, *as amended,* 45 U.S.C. §51. The case at bar involves such a "wrongful death" action.

[8]Because this case involves the FELA's wrongful death provisions, the discussion in this brief will focus upon this Court's decisions concerning the calculation of FELA wrongful death awards. However, because the principle of compensation is equally applicable to all actions brought under the FELA, the reasoning here applies with the same force to nondeath cases.

[9]The legislative history of the Act makes it explicit that Congress had no intention of increasing the financial burdens on railroads beyond requiring that they compensate employees for work related losses:

> "It is no part of the purpose of this legislation to oppress or add burdens to the business enterprises of the country, but rather to promote the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden." Sen.Rep. No. 460, 60th Cong., 1st Sess. 3 (1908).

Act, 9 and 10 Victoria c. 93. *See Michigan Central R. R. Co.* v. *Vreeland,* 227 U.S. 59, 69–72 (1913). By doing so, as this Court held in *Vreeland,* Congress manifested the intention that FELA wrongful death awards are to compensate the specified relatives of the decedent "for the loss and damage resulting to them financially by reason of the wrongful death .... and for that only." *Id.*, at 68, 69–72. This congressional purpose requires that wrongful death recoveries under the FELA be "limited strictly" to the statutory beneficiaries' financial loss. *See Gulf, Colorado, & Santa Fe R. Co.* v. *McGinnis,* 228 U.S. 173, 176 (1913). Consistent with this congressional objective, numerous courts have held that the FELA precludes the award of punitive damages in both wrongful death and personal injury cases. *See, e.g., Kozar* v. *Chesapeake & Ohio Ry. Co.,* 449 F.2d 1238, 1240–43 (6th Cir. 1971); *State ex rel Burlington Northern, Inc.* v. *District Ct.,* 169 Mont. 480, 548 P.2d 1390, 1393–95 (1976).

That these principles of damages are binding on the state, as well as the federal, courts that administer the Act is also clear from the Act's terms and history. The FELA was intended to "supplant" state law and "create uniformity throughout the Union" concerning the extent of a railroad's financial responsibility for injuries to its employees. H. R. Rep. No. 1386, 60th Cong., 1st Sess. p. 3 (1908). Were state courts, in adjudicating the liability of a railroad to its employee, to disregard the restrictions on damages that Congress imposed, it would not only upset the Congressional balance between expanded liability and limited recoveries but would also destroy the desired uniformity. Thus, the question of the proper measure of damages, like all other major incidents of this federal right of recovery,[10] "is inseparably

[10]The "major incidents" of the FELA's right of recovery that are matters of substantive federal law, binding on state courts, are

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connected with the right of action [created by] the Federal Employers' Liability Act," and must be settled according to federal substantive law." *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485, 491 (1916); *see also* Restatement of the Law 2d, Conflict of Law §§171, 178 (1969).

Consistent with the principle that FELA damages must be strictly limited to losses sustained, this Court has, in a wide variety of contexts, reversed state court judgments where the state courts' administration of the Act created a significant risk that the trier of fact would award a sum that would overcompensate the claimant. *Chesapeake & Ohio R. Co.* v. *Kelly, supra*, is illustrative. There, a state trial court had refused to instruct a jury to discount the FELA claimant's lost future pecuniary benefits to their present value, and the state supreme court had affirmed, noting that it was the local state practice not to make such reductions. This Court reversed. Because the jury had been allowed to aggregate future benefits "without taking account of the earning power of the money that [was] presently ... awarded", the plaintiff's verdict was greater in value than the "pecuniary benefits that would have resulted from the continued life of the

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many and varied. *See, e.g., Dice* v. *Akron, Canton, & Youngstown R. R.*, 342 U.S. 359 (1952) (validity of release; allocation of function between judge and jury); *Brady* v. *Southern Ry.* 320 U.S. 476 (1943) (sufficiency of evidence); *see also* Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie problem?, 17 Ohio St. L.J. 384 (1956).

"*North Carolina R.R. Co.* v. *Zachary*, 232 U.S. 248 (1914), establishes that the FELA preempts the state law of damages in cases involving the liability of railroads to their employees. There, the state court had been oblivious to the existence of the FELA and awarded wrongful death damages based on a local law which "seem[ed] not" to limit recovery to the pecuniary losses sustained by specified beneficiaries. *Id.* at 256–257. Because this Court determined that the fatal accident had been covered by the terms of the FELA, the state court judgment was reversed.

deceased" and thus was contrary to the purpose of damages awards under the FELA. *Id.*, at 489. To ensure that such awards not exceed the value of the loss to the claimant, this Court held that all courts administering the FELA must instruct the juries that any damages awarded for lost future benefits must be based on their present value only. *Ibid.*

This standard has been strictly enforced in other decisions of this Court. In *Michigan Central R. R.* v. *Vreeland*, 227 U.S. 59 (1913), for example, the Court reversed the judgment of the state court because the trial court's instructions had not precluded the jury from including in the award an amount for an element that does not represent a financial loss to the decedent's beneficiaries: loss of society and companionship. *Id.*, at 70–74. Similarly, in *Kansas City Southern Ry.* v. *Leslie*, 238 U.S. 599 (1915), the state judgment was reversed because the instructions had allowed the jury to include in the award portions of the decedent's estimated gross earnings which would not have been contributed to the beneficiaries if there had been no accident. *Accord, Gulf, Colorado, & Santa Fe R. Co.*, v. *McGinnis*, 228 U.S. 173 (1913).

These cases and the principles they establish control both of the questions presented here.

II. THE ILLINOIS COURTS' REFUSAL EVER TO PERMIT CONSIDERATION OF THE EFFECT THAT INCOME TAXATION WOULD HAVE HAD ON A DECEDENT'S DISPOSABLE INCOME VIOLATES THE PRINCIPLE THAT DAMAGES NOT EXCEED COMPENSATION FOR CLAIMANT'S LOSS.

The Illinois courts in this case adopted the flat rule that no matter how greatly income taxation would have reduced a decedent's disposable income if there had been no accident, a tribunal may not consider the impact of income taxation on

the decedent's earnings in computing an FELA award. Thus, even though income taxation would have had a substantial and significant effect on decedent's estimated gross earnings, the Illinois courts refused to permit petitioner to place before the jury its evidence of the taxes decedent would have paid. The obvious effect of this ruling was to preclude the jury from deducting the amount of those taxes from its award,[12] and, as a result, the jury included the present value of the tax payments decedent would have made in its award. This violated the federal requirement that courts administering the FELA "strictly limit" wrongful death recoveries to claimants' pecuniary losses.

A. A Reduction For The Income Taxes A Decedent Would Have Paid Is An Essential And Integral Part Of The Determination Of The Value Of His Beneficiaries' Net Pecuniary Loss

A reduction for the taxes the decedent would have paid is an essential and integral part of the determination of the value of the loss to a decedent's beneficiaries.

Because wrongful death awards under FELA are intended to compensate the decedent's beneficiaries for *their* losses, the measure of these recoveries is the amount that the decedent would have *contributed* to those beneficiaries, not the *gross* amount the decedent would have earned over his working life. In determining the value of the beneficiaries' lost receipts, the tribunal thus must deduct from the decedent's gross earnings all those amounts that the decedent would not, or could not, have used to support them. *Kansas City Southern Ry.* v. *Leslie*, 238 U.S. 599 (1915), makes this explicit. There, the state trial court had instructed the jury

[12]Had this evidence been admitted, the decedent's estimated tax liability would have been one of the "deductions" made from gross earnings. *See* A84.

that the damages that decedent's wife and child had incurred as a result of his death would be the present value of the difference between the gross amount the decedent would have earned and his personal expenses. This Court reversed the judgment that had been entered for the plaintiff, holding that the probable result of this instruction was "materially to prejudice" the railroad's "right" to pay out only that amount which the decedent would have contributed to his beneficiaries. *Id.* at 604. Although the state court had recognized—as did the Illinois courts here, *see* p. 7, *supra;* A84—that the FELA required the jury to deduct from decedent's gross earnings the amounts that he would have spent on himself, the instruction failed to require the jury also to deduct from decedent's gross earnings the amounts that the decedent would have paid over to individuals other than the statutory beneficiaries. *Accord, Gulf, Colorado & Santa Fe R. Co.* v. *McGinnis*, 228 U.S. 173 (1913).

The taxes a decedent would have paid on his earnings are simply one example of monies that a decedent could not have used to support his dependents. Just as the FELA requires a deduction from estimated gross earnings for the decedent's personal expenditures and for amounts paid non-beneficiaries, so too it must also require adjustments for the taxes the decedent would have paid. The only amounts decedent could have contributed to anyone would have been taken from his "net earnings after the payment of taxes." *Floyd* v. *Fruit Industries*, 144 Conn. 659, 136 A.2d 918, 922 (1957).[13]

[13]The suggestion that the amount of income tax liability is "collateral" to the issue of what will be a just verdict, *see* Respondent's Opposition to Petition for Certiorari, at 6, ignores that the issue here is the amount of the contributions that the wage earner would have made to his beneficiaries if he had lived. This is no more "collateral" to the issue than is the amount the decedent would have spent on himself. Deductions for both are required to limit the award to the beneficiaries' losses.

To hold, as the Illinois courts have, that the amount of taxes payable on estimated lost earnings can never be an appropriate consideration not only contravenes these established damages principles, but it can confer enormous windfalls. The facts of *British Transport Comm'n* v. *Gourley*, [1956] A.C. 185, 3 All E.R. 796, illustrate the point. There, the trial court had awarded the claimant the sum of £37,720 "in respect of lost earnings actual and prospective" but found that if he had taken into account the taxes which would have been paid if the injured party had actually earned that sum over the period of his disability, the lost earnings component of the award would have been reduced to £6,695. The House of Lords reversed the judgment and held, overruling a number of earlier decisions, that the incidence of taxation must be taken into account in calculating tort damages. To hold otherwise and pretend that "a taxpayer has the benefit of his full income is . . . to be out of touch with reality" and to award the claimant substantially more than he lost. *Id.*, 3 All E.R., at 805 (Lord Goddard).

In so holding, the House of Lords recognized that it would be "fallacious to consider the problem as though a benefit were being conferred on a wrongdoer by allowing him to abate the damages." *British Transport Comm'n* v. *Gourley, supra*, 3 All E.R. at 802 (Earl Jowitt). Not only would no benefit be conferred,[14] but to focus on the defendant's situation is to ignore that the only relevant question is the amount of the loss sustained. The only conceivable justification for requiring a

[14]The argument to the contrary proceeds from the erroneous premise that, because the defendant paid out the decedent's full wages before the accident, the defendant will profit from his wrong if the lost earnings portion of the award is based on after tax earnings. The fallacy of such reasoning is obvious. Before the accident, the employer was paying only for the decedent's services. After the accident, the employer pays "someone else to perform the services" plus the decedent's beneficiaries' loss. *See British Transport Comm'n* v. *Gourley, supra*, 3 All E.R., at 809 (Lord Reid).

railroad to pay out an amount in excess of the loss sustained is some notion that the defendant deserves to be punished. Such a notion has no place in the administration of a law, like the FELA, which is designed to redistribute losses, not to punish wrongdoers,[15] and, indeed, which precludes the award of exemplary damages. *See, e.g., Kozar* v. *Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1240–43 (6th Cir. 1971).

As aptly stated by the Connecticut Supreme Court:

> "It would be difficult to conceive of a more unjust, unrealistic or unfair rule than one which would lead a jury to base their allowance of reasonable compensation for the destruction of earning capacity on the hypothesis that no income taxes would be paid on net earnings." *Floyd* v. *Fruit Industries*, 144 Conn. 659, 136 A.2d 918, 922 (1957).

Numerous other courts and commentators have agreed.[16]

[15]Indeed, because the whole trend in the judicial interpretations of the FELA has been further to dilute the concept of fault so as to ease recovery by accident victims, *see Brown* v. *Western Ry.* 338 U.S. 294 (1949) (presence of clinker of coal in yard is actionable negligence); *see generally*, Alderman, What the Supreme Court Has Done to the Old Law of Negligence, 18 Law & Contemp. Prob. 110 (1953), any notion that FELA defendants are, as a class, blameworthy and worthy of punishment is impossible to maintain. And certainly in the present case, where the act of a vandal was the precipitating cause of the accident, no argument can be made that petitioner's conduct was such that it should be punished.

[16]*See, e.g., LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir. 1965); *Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893, 895–96 (7th Cir. 1967); *Burlington Northern Inc.* v. *Boxberger*, 529 F.2d 284, 287–95 (9th Cir. 1975); *Sanchez* v. *Denver & Rio Grande W. R.R.*, 538 F.2d 304 (10th Cir. 1976); *Geris* v. *Burlington Northern Inc.*, 277 Or. 381, 561 P.2d 174 (1977); *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 623–29 (1975); *Adams* v. *Deur*, 173 N.W.2d 100 (Iowa 1969); II F. Harper & F. James, Law of Torts §25.12 (1956); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St.L.J. 212 (1958); Burns, A Compensation Award for Personal Injury or Wrongful Death Is Tax-Exempt: Should We Tell the

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B. There Is No Justification For A Deviation From The Principle Of Compensation

None of the arguments advanced for the rule Illinois adopted in this case is either persuasive or sufficient to justify ignoring the effects of income taxation where, as here, it would have significantly reduced the decedent's disposable income.

1. *The Determination Of The Effect Of Taxation On A Decedent's Lost Earnings Is No More Speculative Than Other Required Components Of Damages Computations.*

The reason that is most often advanced to support the Illinois position is that the predictions and estimates involved in calculating future income tax liability are so speculative and conjectural that they cannot be made part of the process of assessing damages, no matter how great the injustice. *See, e.g., Huddell* v. *Levin*, 395 F.Supp. 64, 88 (D.N.J. 1975). This argument is untenable. The determination of the impact that taxation would have had on a decedent's estimated earnings requires no more—and in many instances far less—speculation than do the other predictions and estimates that a tribunal makes in computing damages.

The basic claim must be assessed in light of the damages computations that our system already requires. The determination of the value of a tort claimant's losses can never be made with mathematical exactitude. *See Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893, 896 (7th Cir. 1967); *British Transport Comm'n* v. *Gourley, supra*, 3 All E.R., at 803 (Opinion of Earl Jowitt). In large part, this is because the practice of awarding damages for past and future losses in a single lump sum requires the tribunal to make predictions about a number of uncertainties of the future, such as, the trends of any individual's future earnings, future interest rates, or an individual's future family relationships. Indeed, some of the recognized elements of damages cannot reliably be assigned economic values: *e.g.*, conscious pain and suffering.[17]

Against this background, the objection that income taxation is too speculative to be considered by a jury has no merit. The argument, first, has no applicability whatever to the determination of the taxes that would have been paid on *past* lost earnings, *i.e.* those amounts that would have been earned between the accident and the date of trial. The only conjecture with respect to these pertains to what the decedent's earnings would have been for that period, and that the plaintiff must prove. Once past lost earnings are determined, taxes can be computed with the same exactness as though a regular tax return were being filed by the decedent.[18]

As to the taxes on a decedent's projected future earnings, the basis for the objection is that there may be changes in the tax laws that would affect the rate at which that income would have been taxed in the future. But in the view of the fact that personal income taxation has continued in this

Jury?, 14 DePaul L.Rev. 320, 321–26 (1965); Morris & Nordstrom, Personal Injury Recoveries and the Federal Income Tax Law, 46 A.B.A.J. 274 (1960); Stripp & Rowland, Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases—Recent Developments, 36 Ins. Counsel J. 231 (1969); Note, 50 Ky.L.Rev. 601 (1962); Note, 56 Minn.L.Rev. 503 (1972); Note, 8 Tulsa L.J. 242 (1972).

[17]Two of the leading authorities on the law of torts have observed that "pain and suffering have no exchange value and there is no attempt to equate them to anything like that." F. Harper & F. James, *The Law of Torts* §25.03, at 1322 (1956).

[18]Accordingly, at least one court has recognized that, even if the evidence of a decedent's future tax liability is not considered, it is error for a court to exclude evidence of *past* tax liability. *See, e.g., Varlack* v. *SWC Caribbean, Inc.*, 550 F.2d 171, 177–178 (3rd Cir. 1977). Because the Illinois courts excluded evidence of past as well as future taxes, the adoption of the rule in *Varlack* would require a reversal here.

country without substantial change, for decades, surely "[n]othing can be more certain than that there will be a federal income tax in the years to come and that it will be substantially what it is now and what it has been for many years." *McWeeney* v. *New York, New Haven & Hartford R. Co.*, 282 F.2d 34, 42 (2d Cir. 1960) (Lumbard, J., dissenting). In any case, estimates as to the future impact of taxation assuredly involve no more conjecture—and indeed involve a good deal less—than do the other predictions that are inherent in any attempt to estimate the value of the contributions a decedent would have made to his dependent relatives if there had been no fatal accident. In this case, for example, respondent's witness Friedman's computation of the pecuniary loss to decedent's wife and children included a number of assumptions about future events: *e.g.*, that had he survived, Liepelt would have lived his entire life expectancy, earned the equivalent of a fireman's wages for the period from 1973 to 2000, and remained married to his second wife (he was divorced from his first wife, *see* A27) for the rest of his life. In view of the possibility of death from natural causes or of a disabling non-compensable injury, and the instability of family relationships, each of these assumptions was a good deal more speculative than would have been a prediction concerning the effect that taxation would have had on those amounts it was projected Liepelt would have earned. And estimates concerning the amount of future taxes clearly would involve far less conjecture than did, for example, permitting the jury in this case to assign a value to the guidance decedent would have provided his children in the future even though plaintiff's own expert witness testified that it was not possible reliably to assign a value to this loss. (A59–A60).

The observation of Professor Harper and James is compelling:

> "[F]uture taxes are no more speculative than many other items that go into prophecies about future losses in this uncertain world of ours—witness the future earnings of a young child or the future trends in the dollar's value. As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as 'death and taxes' the courts are avoiding their responsibilities when they decline to make the best guess they can, once all the reasonably available evidence is brought before them." II F. Harper & F. James, *Law of Torts* ¶25.12, at 1327 (1956) (footnotes omitted.).[19]

For these reasons, the Court of Appeals for the Ninth Circuit has stated that "there is absolutely no reason why a court cannot admit evidence of the tax payments that a decedent or injured wage earner would have been required to make." *Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284, 292 (9th Cir. 1975). *See also Cox* v. *Northwest Airlines Inc.*, 379 F.2d 893, 896 (7th Cir. 1967); *British Transport Comm'n* v. *Gourley, supra*, 3 All E.R. at 806 (Opinion of Lord Goddard).

2. *The Impact Of Income Taxation Can Be Determined As Readily By Judges Or Juries As Other Elements Of An Award.*

A related argument for the flat prohibition Illinois has here adopted is that the computation of income tax liability is too difficult a task for the average juror and would unduly complicate a trial. This is unpersuasive for similar reasons.

The principle that FELA damages be strictly limited to the claimant's pecuniary loss already requires that juries

[19] As one commentator has put it:

> "[Because] plaintiff receives the advantage of speculation in his favor, [courts should not] bar defendant from even trying to show what appears to be a smaller speculation in his favor[.]" Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St. L.J. 212, 227 (1958).

make far more difficult computations than those involved in making adjustments for income tax liability. *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485 (1916), establishes the point. There, the Kentucky Court of Appeals refused to require that a jury discount a claimant's lost future pecuniary benefits to their present value because "to figure interest on deferred payments, with annual rests, and reach a present cash value is more than ought to be asked of anyone less qualified than an actuary." *Id.*, at 489. While agreeing that these may be "difficult mathematical computations for the ordinary jury man," this Court reversed. It observed that there were a number of ways to mitigate the difficulties for the jury, including the use of expert testimony, and that, because the Kentucky approach would inevitably overcompensate the FELA claimants, it was imperative that the computations be made. *See id.*, at 491.

Kelly is dispositive. Whatever else may be said about the consideration of income tax liability, it surely presents a far easier task for a jury than does the discounting to present value of future losses or other determinations that juries routinely make in other contexts. Not only would the determination of the tax liability of railroad employees ordinarily involve very manageable computations for laymen, but today's jurors have had personal experience in determining their own income taxes.[20] With the aid of competent expert

[20]According to the most recent statistics available, approximately 70% of the taxpayers in the United States do not itemize deductions, and over 33% use the so-called short form (Form 1040A). *See Internal Revenue Service, Statistics of Income 1976: Individual Tax Returns*, Publication 79 (4-79) pp. 17, 20, 38 (1979). Thus, respondent's implication to the contrary notwithstanding, it would be the unusual case in which juries would have to consider "the type and amount of deductions, the effect of tax exempt earnings, tax shelters, and taxes on investment earnings." Opposition to Petition for Certiorari, at 4. Of course, even in the rare case in which such items are

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testimony, juries surely are as equal to this task as to the other more complex aspects of determining the proper awards. *See Burlington Northern, Inc.* v. *Boxberger*, *supra*, 529 F.2d at 293.

Nor is there any merit to the related suggestions that consideration of income tax liability would convert the trial of a negligence action into a tax case, and divert the jury from the true issues of the case. *See Frankel* v. *United States*, 321 F. Supp. 1331, 1349 (E.D. Pa. 1970), *aff'd* 466 F.2d 1226 (3d Cir. 1972). It would be the unusual case in which any income tax questions would be other than the simplest variety, *see* n. 20, *supra*, and there is no reason why consideration of the effects of income taxes could not be integrated into the testimony concerning the extent of pecuniary loss. For example, in the present case, plaintiff's expert witness Friedman could readily—without lengthening the trial at all—have testified concerning the amount of the decedent's estimated income taxes immediately before making the allowance for personal expenses. The issue of the impact of taxes is no more likely to dominate the proceedings than are any of the other questions that can affect the size of the verdict, such as the interest rate to be used in discounting the award to its present value, or the amount of the allowance for personal expenses.

In short, as the New Jersey Supreme Court has stated, the consideration of income taxation will surely not present any "insurmountable problems for the trial courts or juries." Because damages are to be compensatory only, "simplicity [cannot be given] paramount importance in fashioning the law of damages. Such an approach might aid the judiciary, but hardly justice." *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 628 (1975).

present, a jury would, with the aid of expert testimony, have no more difficulty determining tax liability than it would have in determining other elements, *e.g.*, the amount of a decedent's personal expenses.

3. *Ignoring Income Taxation Cannot Be Justified As An Offset Either For Inflation Or For Attorney Fees.*

A further argument for failing to make adjustments for income taxation is that its effects are offset by factors jurors do not consider: future inflation and attorney fees. The former has no application here, for the award implicitly included an adjustment for inflation.[21] The latter is simply irrelevant to the measure of FELA damages, as numerous courts have held. *See, e.g., Counts* v. *Thompson*, 359 Mo. 485, 222 S.W.2d 487, 494 (1949); cf. *Ritter* v. *Ritter*, 381 Ill. 549, 46 N.E.2d 41 (1943).

The American rule is that, unless a statute otherwise provides, courts may not require the losing party in a lawsuit to reimburse the prevailing party for any portion of his attorney fees. *See Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247–71 (1974). This rule is absolute in its nature and may not be circumvented by allowing or requiring the jury to include in a damages award amounts that are not necessary to compensate the claimant for his loss, but that will reimburse him for attorney fees. *Arcambel* v. *Wiseman*, 3 U.S. (3 Dall.) 306 (1796), quoted with approval in *Alyeska Pipeline Co.* v. *Wilderness Society, supra*, 421 U.S. at 249–52.[22]

But even if it were permissible for the judiciary to reallocate the burdens of litigation in FELA cases in the absence

[21]The predicted annual increase in Liepelt's future wages reflected the effects of inflation. *See* A48.

If inflation had not been taken into account here, the remedy would lie in making future inflation a relevant consideration, not in refusing to allow the jury to consider factors, such as income taxes, that directly and substantially affect the pecuniary loss actually sustained by an FELA claimant.

[22]The Ninth Circuit has further stated:

> "Attorneys' fees simply are not relevant in the calculation of what the plaintiff would have received if the decedent had

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of an explicit legislative directive, a refusal to make adjustments for income taxes would be an altogether capricious and haphazard means of doing so. Individuals in low tax brackets would only be awarded a fraction of their fees whereas those in higher brackets would recover the entire amount of their fees, and then some. If the law's failure to permit the prevailing party to recover attorney fees falls short of desirable social policy, the solution should lie in a uniform and well thought out change in the law, and not in the caprice of permitting claimants to recover for elements, like the amount of their decedent's taxes, that bear no relation to either their actual losses or their litigation expenses. *Cf.* II F. Harper & F. James, *Law of Torts*, ¶25.22, at 1348 (1956).[23]

> survived, and it would be no more logical to remind the jury that plaintiff will pay attorneys' fees, in hopes that the award might be increased, than to remind the jury that the defendant will have the additional expense of paying his attorneys, in hopes that the jury will be influenced to decrease the award. Attorneys' fees are related to private contracts between the litigants and the attorneys. They have no legitimate relevancy to the issue as to what amount of money is justly compensatory for the loss resulting from the defendant's tortious act." *Boxberger* v. *Burlington Northern, Inc., supra*, 529 F.2d at 294.

[23]A final justification that has been advanced for the Illinois rule is that 26 U.S.C. §104(a)(2)'s exclusion from taxable income of "damages received . . . on account of personal injuries" has impliedly repealed the FELA rule limiting damages to the value of the claimant's losses. However, there is nothing in §104(a)(2)'s terms or history that even begins to suggest it requires the overcompensation of tort claimants. Not only did Congress not enact §104(a)(2) with the purpose of conferring any such economic benefits, *see* H. R. Rep. No. 767, 65th Cong., 2d Sess. 9–10 (1918), 20 Treas. Dec. Int. Rev. 457 (1918), but the terms of §104(a)(2) preclude the conclusion that it could affect the measure of personal injury judgments. It provides only that a plaintiff is exempt from paying income tax on the "damages received." The statute, quite simply, cannot be read as prescribing the elements to be used in calculating

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C. The Refusal Of The Illinois Courts To Admit The Evidence Of Decedent's Estimated Income Tax Liability Requires Reversal

In sum, none of the arguments advanced for Illinois' rule even begin to support a rule allowing tribunals to disregard the effects of income taxation in computing FELA awards. As the Ninth Circuit has stated, "fairness and logic ... require a rule providing for the admissibility of evidence of, and corresponding deduction to account for, future income taxes in *all* cases." *Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284, 294 (9th Cir. 1975) (emphasis in original); *accord*, *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 628 (1975) (wrongful death); *Adams* v. *Deur*, 173 N.W.2d 100, 105 (Iowa, 1969) (same).

Some courts that have refused absolutely to prohibit any consideration of income taxation have held that inquiry into the impact of taxation is only required when there is reason to believe that income taxation would have significantly or

the *amount* of those damages. It merely says that after the proper measure of damages has been used to determine the size of the award, the award itself will not be subject to a tax.

Moreover, even if this argument were otherwise valid, it would have no applicability to this case, for §104(a)(2) does not apply to wrongful death awards. Although such awards are not taxable, the reason, as the Internal Revenue Service has twice held, is that wrongful death awards are not income within the meaning of 26 U.S.C. §61, not that §104(a)(2) exempts them from taxation. *See* Rev. Rul. 54-19, 1954-1 Cum. Bull. 179; VII-27-3788, I.T. 2420, VII-2 Cum. Bull. 123 (1928). These holdings follow from the fact a wrongful death award under the FELA is a substitute not for income that would have been earned, but rather for the contributions dependent relatives would have received from the decedent. Because dependent relatives do not realize income as a result of being supported, a wrongful death award does not replace lost income and thus could never be taxable as such. *Cf. Hort* v. *Commissioner*, 313 U.S. 28, 31 (1941).

substantially reduced a decedent's disposable income. *See, e.g., LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir. 1965); *Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893, 895–96 (7th Cir. 1967); *Sanchez* v. *Denver & Rio Grande W. R.R.*, 538 F.2d 304 (10th Cir. 1976); *cf. McWeeney* v. *N.Y., N.H. & H. R.R. Co.*, 282 F.2d 34, 38 (2d Cir. 1960). Even this intermediate approach would dispose of this case—and indeed of nearly every FELA case.[24] Not only do decedent's projected future earnings ($16,800 to $51,600)[25] fall within the dollar range in which inquiry into the effects of taxation is mandatory, *see Burlington Northern, Inc.* v. *Boxberger, supra*, 529 F.2d at 290 (summarizing cases), but petitioner's offer of proof here showed that consideration of income taxes would have significantly affected the size of the judgment. To reverse the judgment in this case, therefore, this Court need only hold that it is impermissible to ignore a decedent's estimated income tax liability in computing FELA wrongful death damages where, as here, the impact of taxation is shown to be significant.

[24]The wages of railroad workers have increased steadily over the past two decades, and have now attained a level where income taxation will have a significant effect both on those earnings and upon any projected increases in them. In 1977, for example, the annual average wages for various categories of non-operating railroad employees ranged from $13,208 to $22,447, *see* National Railway Labor Conference, Wage Statistics, Annual 1977, Non-Operating Employees, p. 3 (1978), and for operating employees, like decedent, the annual average wages in 1977 for the various categories of railroad laborers ranged from $16,373 to $29,154.04. *See* National Railway Labor Conference, Wage Statistics, Annual 1977, Operating Employees, p. 4 (1978).

[25]The focus is upon lost *future* earnings because there is no practical problem with the determination of the effect of taxation on lost past earnings. *See* p. 25 and n. 18, *supra*.

III. THE REFUSAL OF THE ILLINOIS COURTS TO ALLOW THE JURY TO BE TOLD THAT ITS AWARD WAS NOT TAXABLE CONSTITUTED A SEPARATE AND WHOLLY INDEPENDENT VIOLATION OF THE REQUIREMENT THAT COURTS STRICTLY LIMIT FELA DAMAGES TO LOSSES SUSTAINED

The second question presented in this case arises because the courts below refused to permit the jury to be advised that any damages it awarded would be free of taxation to respondent.[26] Although this question is not unrelated to the first, it presents an entirely distinct claim of error.[27] Petitioner's claim here is that by refusing to permit the jury to be advised of the nontaxable character of its award, the Illinois courts created a significant and unjustifiable risk that the jury would award not only the amount of the loss suffered by decedent's wife and children as a result of his death, but also,

[26]Wrongful death awards are not income within the meaning of §61 of the Internal Revenue Code and hence are not taxable to the recipient. *See* Rev. Rul. 54-19, 1954-1 Cum. Bull. 179.

[27]The following example illustrates why the two issues here presented are analytically distinct. Assume that the lost future earnings of a decedent were $100,000 per year, that his tax liability on those earnings would have been $40,000, and that, but for the accident, he would have worked one additional year, so that the amount of actual damage would be $60,000 (ignoring personal expenditures). Regardless of how "lost earnings" is measured in this example, a failure to advise the jury of the nontaxable character of its award will create the wholly independent risk that the jury will assume the award taxable and award the plaintiff an additional amount to compensate for an imaginary tax. For example, had the jury followed a gross earnings test in this hypothetical, it might have awarded $100,000, which would have represented a double tax windfall of $40,000 for the taxes on lost earnings and $40,000 for

(footnote continued on next page)

in addition, the amount of taxes that would have been payable on the award if it were taxable.

The rule in Illinois is that it is never proper for a jury to be told, "either by oral argument or by written instructions," that its award will not be subject to taxation. *See Hall* v. *Chicago & North Western R. Co.*, 5 Ill.2d 135, 125 N.E.2d 77, 86 (1955); *accord, Raines* v. *New York Central R.R. Co.*, 51 Ill. 2d 428, 430, 283 N.E.2d 230 (1972). Accordingly, the trial court in this case refused even to consider instructing the jury that its award would be tax free and that no amounts should be added to it on account of taxation. (A82, A87). This Illinois rule is clearly contrary to the principle that FELA damages must be strictly limited to losses sustained. As numerous courts have held, trial courts must, at the very least, have the discretion to instruct the jury that awards are not taxable.[28] Indeed, because the benefits of such an instruction are so clear and the risks associated with giving it so minimal, other courts—and nearly every commentator that has considered the matter[29]—take the position that this

the "taxes" on the award. But had it followed a net earnings test, the jury still might have awarded a tax windfall, albeit a single one, for it might have returned a verdict of $84,000, $60,000 for the lost contributions and $24,000 for the imagined tax on the award.

In view of the distinct risks involved, it is not surprising that the courts that require instructions on non-taxability of the award include some that require a "gross earnings" measure of lost earnings, *see, e.g., Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1248–52 (3rd Cir. 1971), as well as some that have adopted a "net earnings" rule. *See, e.g., Burlington Northern, Inc.* v. *Boxberger, supra*, 529 F.2d, at 295–297.

[28]*See, e.g., McWeeney* v. *New York, N.H., & H.R.R. Co.*, 282 F.2d 34, 39 (2nd Cir. 1960); *New York Central R.R. Co.* v. *Delich*, 252 F.2d 522, 527 (6th Cir. 1958); *Nichols* v. *Marshall*, 486 F.2d 791, 794 (10th Cir. 1973); Annot., 63 A.L.R.2d 1393, 1398 (1959), and later cases in A.L.R. Supp. Service.

[29]*See* II F. Harper & F. James, Law of Torts §25.12, at 1327–28

(footnote continued on next page)

instruction must be given wnenever the defendant requests it. *See Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284, 295–297 (9th Cir. 1975); *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1248–52 (3rd Cir. 1979); *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 629 (1975); *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952). On the particular facts of this case, the failure to give this instruction created a definite and significant risk that the jury overcompensated the respondent.

Because damages under the FELA must be "strictly limited" to the value of the losses sustained, instructions given in FELA cases may not allow the jury to base any portion of its award on an improper element. *Michigan Central R. R.* v. *Vreeland*, 227 U.S. 59 (1913), establishes the point. There, the trial court had, correctly, instructed the jury that it could not award any damages to decedent's widow for her grief and sorrow, and that they should "confine themselves to a proper compensation for the loss of any pecuniary benefit."

(1956); Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?, 14 DePaul L.Rev. 320 (1965); Feldman, Personal Injury Awards: Should Tax Exempt Status Be Ignored?, 7 Ariz.L.Rev. 272 (1965); Henderson, Some Recent Decisions on Damages: With Special Reference to Questions of Inflation and Income Taxes, 40 Ins. Council J. 423 (1973); Morris, Should Juries in Personal Injury Cases Be Instructed that Plaintiff's Recoveries Are Not Income With the Meaning of the Federal Tax Law?, 3 Defense L.J. 3 (1958); Morris & Nordstrom, Personal Injury Recoveries and the Federal Income Tax Law, 46 A.B.A.J. 274 (1960); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St.L.J. 212 (1958); Stripp & Rowland, Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases, Recent Developments, 36 Ins. Council J. 231 (1969); 26 Ford. L.Rev. 98 (1957); 42 GeoL.J. 149 (1953); 50 Ky.L.J. 601 (1962); 44 Ky.L.J. 384 (1956); 56 Minn. L.Rev. 503 (1972); 33 Ohio St.L.J. 972 (1973); 32 Tex. L.Rev. 108 (1953); 25 U.Cin.L.Rev. 385 (1956); 9 Vand.L.Rev. 543 (1956); 11 Wash. & Lee L.Rev. 66 (1954).

Id., at 72. However, it further instructed the jury that it could consider, "draw[ing] upon [their] experiences as men . . . what it would have reasonably been worth to [the widow] in dollars and cents to have had . . . the care and advice of her husband." *Id.*, at 73. Although adherence to the literal terms of this instruction, taken as a whole, would not necessarily have resulted in an award based on improper elements, *see id.*, at 74, the Court set aside the award because the instructions did not preclude the jury from considering one improper element: "the value of the widow's loss of society and companionship of her husband." *Ibid; accord, Kansas City Southern Ry.* v. *Leslie*, 238 U.S. 599 (1915) (verdict reversed because instruction did not prohibit jury from including in award amounts decedent would have paid over the third parties); *Gulf, Colorado & Santa Fe R. Co.* v. *McGinnis*, 228 U.S. 173 (1913) (same). In recognition of the need to eliminate any risk that jurors will award any amounts for the grief or loss of society and companionship, Illinois courts, in FELA wrongful death cases, now routinely—as the trial court did here, *see* A84—instruct juries that they are not permitted to award any amounts for these factors. *See* Illinois Pattern Jury Instructions, Civil, Federal Employers' Liability Act (IPI), §160.15 (2nd Ed. 1971).

These principles compel the reversal of the decision below. It clearly would have been a flagrant violation of FELA for respondent here to have been awarded not only the value of decedent's beneficiaries' loss but also, in addition, the amount of taxes that would have been payable on the award if the award were taxable. Yet, by refusing to permit the jury to be told that its award would be tax free, the trial court created a significant risk that the jury inflated the award to include the amount of such an imagined tax.

Judicial notice is routinely taken of the way in which ours has become a tax conscious society. *See, e.g., Burlington Northern,*

Inc. v. *Boxberger*, *supra*, 529 F.2d at 297. Not only does nearly every wage earner in the United States pay out a substantial percentage of his wages in taxes, but public attention is constantly being focused upon the fact that nearly every receipt of money creates a "taxable event." *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1251 (3rd Cir. 1971). By the same token, because few members of the general public are aware of the rule that wrongful death or personal injury awards are exempt from taxation, "it is reasonable to assume the average juror would believe [its award will] be subject to such taxes." *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W.2d 42, 45 (1952).

That a jury's views concerning the taxability of its award could affect its determinations of damages is illustrated by the reported instances in which juries, after having been fully instructed by the court, have asked the judge whether the award is taxable. *See, e.g., Spencer* v. *Martin K. Eby Constr. Co.*, 186 Kan. 345, 350 P.2d 18, 21 (1960); Knachel, Jury Instructions on Tax Exemptions in Personal Injury Cases, 6 Cleve. Mar.L. Rev. 71, 74 (1957). The reasons juries make such inquiries is self-evident. The jury will always be instructed—as it was here, *see* A83—to fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for their pecuniary loss. Under the terms of such instructions, the jury could reasonably believe that it was its duty to ensure that respondent would receive the amount of *disposable* income that would fully compensate the decedent's survivors for their losses.

Thus, when the jury is not told that the award is not taxable, but concludes that it is its obligation to ensure full "after-tax" compensation, it will assume the award is taxable and add an amount to it to ensure full compensation to the claimants after payment of the imagined tax. And it appears

that precisely this occurred in the case at bar. Here, respondent's expert witness testified that the present value of the net pecuniary loss to decedent's beneficiaries was $302,000, yet the jury returned a verdict of $775,000. Respondent had also sought damages for lost guidance to decedent's children, and the value of that loss was not included in her expert witness's figure. However, it is difficult to imagine a jury awarding $573,000 for the latter, while only $302,000 for the former. The most likely explanation for the verdict is that this jury settled on an award substantially less than $775,000 but believing plaintiff would be taxed, inflated the award to ensure full "after tax" compensation.

Whatever the validity of this explanation, what is determinative here is that the only way to have eliminated the risk that a verdict would have been so inflated would have been to allow the jury to be advised that its award would be tax free. By refusing either to instruct the jury to this effect or to permit petitioner itself to place this fact before the jury, the Illinois courts created that same sort of risk that an award would be based on an improper element as compelled the reversals in *Michigan Central R.R. Co.* v. *Vreeland*, *supra* and *Kansas City Southern Ry.* v. *Leslie*, *supra*.

The arguments that have been advanced to support Illinois' refusal to permit juries to be told that awards are not taxable are singularly unpersuasive. The assertion that to inform juries that its award is tax free would "giv[e] rise to conjecture and speculation," *Hall* v. *Chicago & North Western Railway Co.*, *supra*, 125 N.E.2d at 86, is simply untenable. The sole effect of the instruction would be to inform the jury that it should not make any addition for taxes on the award. It would simplify the jury deliberations by eliminating, not adding, a possible subject for speculation.

The second argument advanced is that to give this instruction is to assume, contrary to established principles, that the jury may misapprehend the instructions concerning the elements of recoverable damages. *Hall* v. *Chicago & North Western Railway Co.*, *supra*, 125 N.E.2d, at 85. This argument reduces to the absurdity that the courts should not afford juries any meaningful guidance as to the elements of damages. All that would be required "is to tell a jury to reach a 'just' verdict and assume that it will do so." Morris & Nordstrom, Personal Injury Recoveries and the Federal Income Tax Laws, 46 A.B.A.J. 274, 275 (1960). Not only is this notion contrary to whole object of jury instructions, it violates the FELA's requirement that the court take affirmative steps to "confine" the jury to consideration of the proper elements of recovery. *See Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 72 (1913).

A final argument that has been advanced is that to require that the jury be told that the award is not taxable would inevitably require the giving of a multitude of instructions concerning the elements of damages, including, for example, "that the fees of plaintiff's attorneys are not recognized as an element of damages" and "that the defendant can deduct any award it pays from its income and excess profits tax return." *Hall*, *supra*, 125 N.E.2d, at 86. But acceptance of petitioner's position would not even remotely support the giving of either these, or any similar, instructions. What distinguishes the nontaxability instruction is that, if it is not given, there is an unacceptably high risk that the jury will overcompensate the claimant but that, by giving the instruction, that risk is eliminated altogether. In contrast, the sole effect of giving either of the two hypothetical instructions would be to invite the jury to base its awards on improper considerations such as the amount of plaintiff's litigation expenses or the cost to the defendant of paying an award.

In short, there is no reason whatsoever not to have given the nontaxability instruction. "The benefits of informing the jury of the true consequences are so clear, and the burden in terms of time and the possibility of confusion so minimal that the balance . . . overwhelmingly . . . favor[s] giving such an instruction." *Burlington Northern Inc.* v. *Boxberger*, 529 F.2d 284, 297 (9th Cir. 1975); *accord*, *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1251 (3rd Cir. 1971); *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 629 (1975); *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952). And, on the facts of this case, the failure to give the instruction (or to permit the petitioner to place the fact of the nontaxability of the award into evidence) so increased the likelihood that the jury would focus on an improper element in computing claimant's damages that the refusal constituted an entirely independent ground for reversing the judgment of the lower court. *Michigan Central R. R. Co.* v. *Vreeland*, *supra*; *Kansas City Southern Ry.* v. *Leslie*, *supra*.

CONCLUSION

For the foregoing reasons, the judgment of Illinois Appellate Court, First District, First Division, should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

BRIEF FOR RESPONDENT

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In the
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OCTOBER TERM, 1978

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NORFOLK AND WESTERN RAILWAY COMPANY,

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vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether this Court should reverse the policy prevailing in the majority of jurisdictions, both state and federal, of computing lost earnings on a gross wage basis?

   (a) Whether Congress intended that an admitted tortfeasor reap the benefit of the humanitarian exclusion of personal injury awards from taxation?

   (b) Whether Congress intended a jury in an F.E.L.A. case to sit as a tax court and speculate on numer-

ous income tax variables that may affect a decedent's earnings and tax status?

(c) Whether the consideration of the impact of taxation mandates the introduction of evidence with respect to other collateral matters which also affect the recovery which respondent will ultimately receive?

2. Whether it was error of reversible magnitude to refuse an inaccurate "cautionary instruction" to the effect that any damage award would not be subject to income tax?

STATEMENT OF THE CASE

1. As to Petitioner's assertion (Pet. Br. 4 Ftn.) that this accident was a result of vandalism, the jury and the Illinois Courts found adversely to the railroad on this purported defense. The Illinois Appellate Court's opinion adequately reviews the issue of liability, and that issue is not before this Court. The railroad's Petition for Certiorari and its brief do not contest the issue of liability.

2. Plaintiff's expert did not testify that decedent's estimated salary in the year 2000 (the date of decedent's projected retirement) would reach $51,000 (Pet. Br. 4; A 54-55).

3. The trial judge did not rule that defendant's offer of proof "was very properly made," but rather indicated that the comments made by the attorney for the Petitioner were correctly not made before the jury.

SUMMARY OF ARGUMENT

The position of the Petitioner, an admittedly negligent tortfeasor, requesting the reversal of the judgment entered against it in the Circuit Court of Cook County is untenable. By seeking a reduction in the amount of future lost wages

to which the Respondent is entitled, and which the railroad does not deny it was obligated to pay, the Petitioner is attempting to assert an unfounded claim to the tax benefit which Congress intended to bestow on persons killed or injured, when damage awards, health insurance benefits, and workmen's compensation payments are made.

The introduction of evidence of future taxation permits consideration of testimony, which, at best, is based upon speculation and conjecture as to future rates of taxation and numerous, indeterminate deductions. It will unnecessarily prolong trials and confuse jurors with complex calculations. Yet there has been no demonstration as to how these additional calculations will materially affect the jury's verdict.

If awards are to be uniform, and if, as the railroad admits, the Respondent is to receive full compensation for lost pecuniary benefits, then the approach which the Petitioner urges only goes halfway in its consideration of the taxation which must necessarily be accounted for to reach the desired result. After deductions for future taxes on lost income are made and the present value of future lost earnings is determined, then further calculations must necessarily be made to increase the award by the amount of tax which must be paid on the interest which any lump sum award will earn, or full recovery will not be realized.

Similarly, to provide full and complete recovery the impact of taxation is not the only collateral factor, which must be taken into consideration. In the instant case, an admittedly negligent tortfeasor was not willing to provide full recovery without the Respondent retaining an attorney and prosecuting this litigation through the highest level of appeal. Necessarily, when this litigation is resolved, the amount of her recovery will be reduced by the fees and

costs incurred. Therefore, if certain collateral matters are to be taken into account, then the jury must also be advised of the many deductions which will affect the amount the Respondent is to ultimately recover.

The railroad's thinly disguised attempt to defeat a full recovery by the Respondent is also well illustrated by its proposed "cautionary" instruction which is also a half measure, that will be more likely to misinform jurors than to instruct them as to the actual tax consequences which arise with respect to a lump sum award of damages. While it is true that the award itself is not subject to income tax, it is not true, as the instruction implies, that Respondent will never pay income tax on the proceeds of the award. Any interest earned on the award is subject to taxation as ordinary income. Accordingly, if a cautionary instruction is deemed necessary, then such an instruction should fully and completely relate the exact tax consequences which affect the award.

However, it is the position of the Respondent, that the proposed instruction, in addition to being incorrect, is also superfluous, in that it assumes that juries automatically disregard the instructions given to them by the Court. The Petitioner has offered no evidence for this claim, nor has any assertion been made that the instructions which the jury received were not properly formulated. Absent any showing that a compelling need has been demonstrated which requires that this type of instruction be given uniformly, there exists no basis for the reversal of the judgment of the lower court.

Irrespective of what action this Court may decide to take with respect to the issues raised herein, the Petitioner is not entitled to a new trial on the issue of damages with respect to the instant litigation. No evidence was offered during the trial of this cause to support Petitioner's contention that the calculation of the income tax consequences on decedent's loss of earnings would have materially changed the amount of the verdict returned by the jury. Further, Petitioner's offer of proof was totally deficient under Illinois law, and the witness whose testimony the attorney for the Petitioner sought to introduce was not properly disclosed as provided by court order. The Petitioner has no basis for any claim that a different outcome should result in the instant case.

As is demonstrated below, any change in the manner in which loss of wages is computed in an F.E.L.A. claim or the requirement that a mandatory instruction discussing the incidence of taxation be given would be a radical departure from the precedent followed by the majority of state and federal jurisdictions in this country. It is, therefore, the position of the Respondent that given the fact that the instant record is totally devoid of any evidence that the Petitioner did not receive a fair trial or that the judgment entered was excessive, any change in the current status of the law should be prospective only.

I.

INTRODUCTORY STATEMENT

Any discussion of the measure of damages in an F.E.L.A. claim must necessarily be put in the context of the purpose which the Federal Employer's Liability Act was designed to effectuate.

As this Court emphasized in *Kerman* v. *American Dredging,* 355 U.S. 426, 431-432, 78 S.Ct. 394 (1958):

> "But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the F.E.L.A. and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying common law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. *But it is clear that the general congressional intent was to provide liberal recovery for injured workers. Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 508-510, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers."

The questions raised herein do not merely revolve around a debate over a proper method of calculation of damages. There are more fundamental questions of public policy at issue. If it is true, as the Petitioner concedes, that an injured plaintiff should receive full recovery of all pecuniary benefits which have been lost as the result of the negligence of another, then the measure of damages employed to define that loss must necessarily be based upon gross wages which the admittedly negligent tortfeasor would have been obligated to pay. Whether or not the recipients of the award incur any tax liability is a collateral matter, which is not a relevant consideration to the tortfeasor's obligation. However, if policy dictates that consideration of collateral issues is of such consequence, which the Respondent denies, then many other relevant collateral factors which are also pertinent to the issue of pecuniary loss must be taken into account if the Respondent is to receive the full recovery which is consistent with the purpose and intent underlying the F.E.L.A.

II.

IT WAS NOT THE INTENT OF CONGRESS THAT STATE, AS WELL AS FEDERAL COURTS "STRICTLY LIMIT" RECOVERIES IN WRONGFUL DEATH ACTIONS TO THE VALUE OF THE NET PECUNIARY LOSS SUFFERED BY DECEDENT'S BENEFICIARIES.

> "The liberal purpose of this chapter must be kept in mind when confronting arguments which would restrict an employer's liability under this chapter." *Baker* v. *B. & O. Ry.,* (C.A. Ohio 1974), 502 F. 2d 638.

The social policy which motivated the enactment of the Federal Employer's Liability Act was the desire on the part of Congress to insure that railroad workers receive full compensation for injuries sustained as a result of the negligence of their employer. While it is conceded that

money can never make whole a plaintiff who has lost his limb or restore the life of a decedent, it would contravene the underlying social policy of the F.E.L.A. to permit an admitted wrongdoer to claim deductions and credits against an award of damages which a jury properly found fairly compensated the family of Respondent's decedent for the loss of his life.

A. An Admitted Negligent Railroad Should Not Obtain the Benefit of the Humanitarian Exclusion of Personal Injury Damage Awards from Tax Liability.

> "The provisions of Section 22 (b)(5) [1] undoubtedly were intended to relieve a taxpayer who has the misfortune to become ill or injured, of the necessity of paying income tax upon insurance benefits received to combat the ravages of disease or accident." *Epmeier* v. *United States,* 199 F. 2d 508, 511 (7th Cir. 1952) noted approval in *Haynes* v. *U.S.A.,* 1353 U.S. 81, 84-85.

The decision of Congress to exempt awards in personal injury and wrongful death actions bestows a humanitarian benefit on those individuals who have been injured through the misconduct of others.[2] The admitted tortfeasor herein

[1] Section 22(b)(5) was the predecessor section of Section 104(a)(2) and is identical to it.

[2] Petitioner contends that IRS §104(a)(2) was not intended to benefit wrongful death plaintiffs. (Pet. Br. 31-32, ft. nt. 23). Rev. Rul. 54-19, 1954-1, Cum. Bull. 179, relied upon by Petitioner, plainly does not concern the question as to whether wrongful death recoveries are to be treated as income, but rather concerns the issue whether a wrongful death recovery by beneficiaries is to be treated as income for *estate tax purposes,* in determining the gross estate of the decedent. Nor does *Hort* v. *Commissioner,* 313 U.S. 28, 31 (1941) shed any light on the question. The only authority cited by Petitioner in support of its contention that wrongful death recoveries are not covered by §104(a)(2) is pre-1939 ruling to the effect that

(footnote continued)

is now attempting to reap that benefit which was bestowed by Congress upon injured persons by making the fallacious claim that a damage award in which gross earnings form a part of the measure of damages is punitive and permits injured parties to receive a windfall.

The patent error in this assumption, upon which the railroad's entire theory is predicated, is that if the decedent had lived he would have only received his net wages. That is not true. The railroad would have had to pay the decedent gross wages. It would never be a concern of the railroad what, if any, income tax decedent paid to the government. Therefore, the gross wage basis upon which decedent's past and future wage loss was calculated was the proper measure of damages to be applied in this case, as it correctly described the amount of wages which the railroad would have owed to the decedent, if he had lived. Indeed, if Congress had intended that a benefit should be conferred upon negligent tortfeasors and had desired to alter the prevailing "gross wage" basis upon which lost earnings are calculated, it certainly could have amended the F.E.L.A. to reflect that policy. Since this has not been done, it is obvious that the benefit of the exclusion of personal injury damages from taxation belongs to the party to whom Congress granted the exclusion, the injured plaintiff.

Similar attempts by defendants to obtain the benefit of the tax considerations awards on personal injury have fre-

(footnote continued)
the Congress itself did not exempt wrongful death recoveries, but that the tax commissioner himself found that wrongful death awards were not to be treated as income to decedent's estate and not included in the estate for purposes of estate tax calculations. The courts which have considered the question in recent years, however, have viewed §104(a)(2) as being applicable to wrongful death recoveries. As noted in *Huddell* v. *Levin,* 395 F. Supp. 64, 87-89 (D.N.J. 1975) the court noted that wrongful death plaintiffs were certainly among the intended beneficiaries of §104(a)(2).

quently been rebuffed by courts in numerous jurisdictions.[3] As was aptly noted in *Lumber Terminal, Inc.* v. *Nowakowski*, 36 Md. App. 82, 373 A. 2d 282, 292:

> "Taxes are strictly between plaintiff as taxpayer and the government as collector, and are of no legitimate concern of the defendants. See e.g., *Atlantic Coast Line Railroad Company* v. *Brown*, 93 Ga. App. 805, 92 S.E. 2d 874. Although many defendants contend that because such recoveries are not taxable, a windfall is thus provided injured plaintiffs, that argument has a reverse effect. If an award were decreased by estimated taxes, the windfall would be one for the defendant, who has far less claim to it than the wage earner. The tax exemption was intended by Congress to benefit the injured party, not the wrongdoer."

Since the railroad has not suggested that, in fairness, a net wage calculation of future loss of wages would require that the railroad pay the projected lost wages to the I.R.S., and since there exists no provision in the Internal Revenue Code for the collection of those taxes, it is the admittedly negligent railroad herein which seeks the windfall, not the respondent. Given the expressed intent of the F.E.L.A. to provide liberal recovery to railroad workers who have been injured through the negligence of their employers and the humanitarian benefit that Congress has bestowed on those who have been victimized by the negligence of another, the position of the railroad is untenable. The benefit of the tax free status of personal injury and wrongful death awards should be given to the party for whom it was intended, and that party is the injured plaintiff and not the admitted wrongdoer.[4]

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[3] See 63 ALR 2d 1394 and *Geris* v. *Burlington Northern, Inc.*, 561 P. 2d 174 (Ore. 1977).

[4] The intent of this benefit was reaffirmed recently in Rev. Rul. 79-220, I.R.B. 1979-30.5 which exempts annuity payments, as well as lump sum awards paid on account of injury or death. Further, the fact that these annuity payments may be made to the injured plaintiff's estate should he die prior to the expiration of the annuity contract in no way alters the exclusion.

The intent of Congress to bestow a benefit on the ill and injured is apparent from the wording of 26 U.S.C. 104(a)(2), Int. Rev. Code of 1954, §104(a)(2) which states:

> "Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expense) for any prior taxable year, gross income does not include . . . (2) *the amount of any damages received* (whether by suit or agreement) on account of personal injuries or sickness . . ." (Emphasis added.)

The statute refers to damages in the past tense: "received". The government excuses the payment of tax after the injured party receives a judgment or settlement. The statute does not confer an anticipatory tax credit on anyone, particularly an admitted wrongdoer.

Finally, any claim by the railroad industry that the liberal Congressional purpose behind the enactment of the F.E.L.A. should now be constricted, because mismanagement by managerial employees has created financial strain on some railroad lines, is certainly not a relevant factor to be considered in connection with this claim. While attempting to usurp the benefit which Congress has bestowed on injured plaintiffs, the railroad ignores the fact that it is the recipient of numerous Congressional benefits and subsidies which far outweigh any amounts paid for injury related claims. Injury awards pursuant to the provisions of the F.E.L.A. cannot rationally be related to financial difficulties which plague some railroad companies, and such contention is particularly inappropriate in the instant case, where the Petitioner sought to be excused from the filing of an appeal bond, because of its vast net worth. Therefore, this litigation must be considered in the context of the social policy promoted by the F.E.L.A. and the Congressional intent underlying the tax considerations with respect to personal injury awards.

B. The Deduction of Future Taxes From Prospective Lost Wages is a Half Measure Designed to Defeat Full Recovery to the Respondent as Mandated by the F.E.L.A.

Although the railroad purports to claim that the Respondent is entitled to full recovery of lost pecuniary benefits, the use of net wages as the measure of damage with respect to the calculation of future lost wages, is deliberately designed to defeat that purpose. The deduction of future taxes from prospective lost wages in effect imposes a double tax upon the Respondent, because under the railroad's formula there exists no provision to take into account the taxes which must be paid on the interest, which any lump sum award will earn. The proposed calculations are only a half measure and do not fully describe all factors which must be taken into account. The inherent fallacy in the railroad's position was correctly described by the Second Circuit in *McWeeney,* (282 F. 2d at p. 37), where the Court noted:

> "Having duly instructed the jury on how to estimate the number of plaintiff's probable exemptions, and the dates when these will come into being, and on rate brackets and deductions, and the treatment of other income of the plaintiff not affected by the accident, the court would necessarily encounter another problem. Even the best designed instruction that stopped at that point would be unfair to the plaintiff. This is because, as proponents of the instruction recognized, the product of plaintiff's lost earning power ex-tax and his expectancy will have been discounted to produce 'that sum of money which if invested at a fair rate of return, will yield annually the amount by which the plaintiff's earning capacity has been lessened and which will at the time of the end of the plaintiff's life expectancy be reduced to zero.' This takes into account the fact that money earns interest each year; and it should be remembered that this interest is taxable. *Therefore, if a court is going to use income after taxes as a measure of plaintiff's loss, it must add back the taxes which would be due on the interest earned—else the award would not fully compensate for the loss.*" (Emphasis added).

Thus, if the railroad's position is developed to its appropriate and logical conclusion, juries will now be expected to perform complex and speculative computations to determine a net earnings figure. They will then have to formulate a second set of tax calculations to determine the prospective tax which the interest on the award will generate and adjust the award upward to reflect that amount. The only material difference which will result from the performance of these mathematical logistics is that trial and jury deliberation time will be significantly increased, further burdening an already clogged court system[5] and turning the focus of a jury from its true function. There will be little, if any, effect on the size of the award itself.

Therefore, when one considers the fact that the Internal Revenue Service Preliminary Statistics of Income, 1975, Individual Income Tax Returns, Publication 198 (2-77) p. 12 shows that the average wage earner with an adjusted gross income of $13,000-$14,000 paid approximately 9.4% of that income in taxes, and that a reduction of future loss of earning by that amount must be offset with an upward adjustment for the tax on the income that any award of damages would earn, the myriad calculations which the defendant would seek to have the jury perform are of negligible value. This same conclusion was reached by the Oregon Supreme Court in the case of *Geris* v. *Burlington Northern Inc.,* 561 P. 2d 174, 180 (Ore. 1977):

> "The benefits to be derived from the 'precision' approach to pecuniary loss are outbalanced by the greater potential of confusing and overwhelming the jury

[5] The congested condition of the nation's court system was recently commented upon by two Justices of this Court.

and protracting trial time. Even absent such imbalance, the benefit, as hereafter shown, may be miniscule and hardly worth the candle, for, when admittedly relevant evidence has a greater tendency on balance to frustrate rather than promote ultimate ends of justice, the trial court must exercise its discretion and refuse to admit it."

C. Petitioner's Contention That Respondent's Recovery Should Be "Strictly Limited" and Determined on the Basis of Net Pecuniary Loss is Not Well Founded.

The Petitioner's contention that damages in F.E.L.A. claims should be "strictly limited" in wrongful death actions to the net pecuniary loss suffered by decedent's beneficiaries is not supported by the authorities upon which the Petitioner relies. All of the cases cited by the Petitioner antedate the Sixteenth Amendment, are not related to the issues presented herein and are antiquated when considered in the context of the development of these Congressionally enacted remedies.[6]

Michigan Central R. R. Co. v. *Vreeland,* 227 U.S. 59 (1913) merely held that the loss of society and companionship of a spouse was not an element of *pecuniary* loss because those intangible factors could not be given a dollar value. (227 U.S. at p. 71). Petitioner asserts that *Kansas City Southern Ry.* v. *Leslie,* 238 U.S. 599 (1915) reversed a state judgment "because the instructions had allowed the jury to include in the award portions of the decedent's estimated gross earnings which would not have been contributed to the beneficiaries if there had been no accident." (Pet. Br. 19). Respondent fails to see how such propositions may be extracted from the terse holding in *Leslie.* The decision simply states that such instruction was improper but gives no exposition as to the basis for the holding. Therefore, petitioner has no basis for the claim that *Leslie* is clear authority for the "strictly limited" rule which petitioner purports to find in that case.

[6] See *Moragne* v. *States Marine Lines, Inc., et al.,* 398 U.S. 417 (1970) and *Sea-Land Services, Inc.* v. *Gaudet, etc.,* 414 U.S. 659 (1974).

Likewise, petitioner's citation of *Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinnis,* 228 U.S. 173 (1913) is misplaced. Nowhere does the court in that case state that pecuniary losses are to be calculated with mathematical exactitude. Tne context in which the phrase "strictly limited" is employed in that case is that: ". . . damages for wrongful death are to be 'strictly limited' and apportioned to those statutory beneficiaries that sustained a loss." (228 U.S. p. 176).

The reasonable interpretation of the opinion is that damages for wrongful death are to be "strictly limited" to only those who are recognized as beneficiaries under the statute, i.e., those who are eligible for an award rather than the actual amount to be awarded.

In *Chesapeake & Ohio Ry. Co.* v. *Kelly,* 241 U.S. 485 (1916) also relied upon by petitioner, the court required that all lump sum awards under F.E.L.A. were to be discounted to present value. Such a holding is a far cry from the position that "pecuniary loss" is to be "strictly limited to net loss after application of income tax consequences."

III.

THE DEDUCTIONS TO WHICH THE ADMITTED WRONGDOER CLAIMS TO BE ENTITLED ARE SO SPECULATIVE THAT ANY ATTEMPT AT CALCULATION WOULD SEVERELY PREJUDICE THE RESPONDENT FOR WHOSE BENEFIT THE F.E.L.A. HAS BEEN ENACTED AND DENY FULL RECOVERY.

> "An equally compelling reason for excluding the consideration of income tax consequences is that they are collateral to the true issues of the litigation, and would unduly confuse and complicate a jury trial. There is certainly no speculation concerning the incidence of taxation, but the amount of tax which might be assessed against a given individual is a truly complex question. The number of possible exemptions, the type and amount of deductions, the effect of tax exempt earnings, tax shelters and investment earnings, together with a host of other variables, makes any realistic prediction impossible. Unlike economic growth, which is controlled by reasonably fixed principles of economic management, taxes are the creation of a political body, and therefore subject to change from session to session in Congress. Since the enactment of the Sixteenth Amendment, tax rates have changed an average of every three years, and more frequently in recent years. The tax advantage of professional corporations were not considered ten years ago. Tax shelters and permissible deductions are changed, created, modified or eliminated literally with every Congress.
>
> The difficulty of predicting the future of the tax code and its applicability to unknown individual decisions of a taxpayer is compounded by the confusion between the jury's traditional role as a fact-finder and the need to make legal determinations in considering tax consequences. For example, the jury would not only have to predict whether an individual would take advantage of certain tax shelters, the existence of which the jury would also have to predict, but would also have to determine whether the individual would be legally entitled to those shelters. Predictably, there would be legal disputes over such issues as the availability of professional corporation status, the amount and period of withholding income from taxation under retirement plans, the amount and type of legitimate business deductions, the availability of carry-backs, carry-forwards, and income-averaging, and the applicability of differing tax rates to different types of income. Most lawyers spend a full year in law school just to familiarize themselves with basic income tax law, state judges are never exposed to federal tax issues; and even federal judges are rarely exposed to such complicated tax problems. The possibility of conflicting expert testimony extending the average trial by at least a day is not remote. Even then, the trial judge and counsel, much less a lay jury, could not realistically be expected to face this task with other than utmost confusion." *Huddell* v. *Levin*, 395 F.Supp. 64, 90-91 (D. N.J. 1975) vacated and remanded, 537 F.2d 726 (3d Cir. 1976).

It is axiomatic that there is nothing certain in life but death and taxes. However, the amount of tax which a man will pay over his lifetime is a matter of pure conjecture. For the previous thirty years the Internal Revenue Service has not only changed the rate under which a wage earner such as Delroy Liepelt paid income tax, but there have also been numerous, significant adjustments in the manner in which adjusted gross income and taxable income have been calculated, which have materially affected the amount of tax which plaintiff would actually pay. The following are a few illustrations of some of the significant revisions which have occurred in the past thirty years:

a. The amount of personal exemption has been increased from $500.00 in 1947 to $750.00 in 1972;

b. The amount of the standard deduction has been increased from $500.00 in 1947 to $3,200.00 in 1977;

c. The minimum and maximum tax rates have changed from 88% maximum and 17% minimum in 1947 to 70% maximum and 14% minimum in 1965;

d. A $600.00 deduction for child care expenses, which was introduced in 1954 has been changed to a tax credit of up to 20% of the cost up to $4,000 in 1978.

e. In 1975 the Employment Retirement Security Act permitted individuals who were not in qualified pension plans to deduct 15% of their earned income up to $1,500.00 for contributions made to an individual retirement account;

f. In 1973 finance charges on bank credit cards, gasoline credit cards and department store charge accounts were permitted to be deducted as interest; and

g. Deductions for medical expenses were 5% of adjusted gross income with a $2,500.00 maximum in 1947 and have been repeatedly increased until the maximum limit was removed in 1967.[7]

The above examples illustrate recent changes which tend to reduce the amount of tax that an individual such as Delroy Liepelt would be required to pay. It is impossible to speculate as to how further deductions or changes in the rate of tax might effect the amount of tax which a lower income wage earner would owe. Therefore, the computation of future taxes at current rates would not reflect the actual pecuniary loss to the respondent and would deny respondent the full recovery to which the petitioner admits she is entitled.

[7] United States Master Tax Guide, C.C.H. Inc. Vols. 1948-1978.

Further, contrary to the petitioner's assertion, the calculation of taxes even for the ordinary wage earner is not simple. The existence of nationwide tax service firms like H & R Block, as well as the I.R.S. Taxpayer Assistance Program, the I.R.S. Service which computes tax for taxpayers, and the millions of errors in tax computation which the I.R.S. corrects every year belie this contention. In effect, the evidence which the petitioner seeks to introduce would require a jury to sit as a tax court listening to speculative evidence to determine what the future tax liabilities of the decedent might have been, and to determine a figure based on pure conjecture. And, as noted above, the same calculations would then be repeated employing the same dubious figures to arrive at the potential tax consequences on the interest earned by a lump sum award. Such mental gymnastics invite error, in most cases will not materially alter the actual award given, and detract from the primary determinations which a jury should make. For these reasons a majority of jurisdictions have rejected attempts to introduce such collateral matters into this type of litigation and have repeatedly held that "gross earnings" are the proper measure of damages for the computation of future lost wages. As was determined by the Second Circuit in *Cunningham* v. *Rderiet & Vendeggen A/S*, 333 F.2d 308 (2d Cir. 1964, at p. 314):

> "The argument has a certain gloss of persuasiveness about it, due no doubt to its neatness and simplicity, but a careful analysis of respondent's reasoning convinces us that the argument completely misses the point. That New York's wrongful death act permits recovery for only pecuniary losses suffered by a decedent's distributees aids respondent not one whit. The courts in the *McWeeney* and *Montillier* cases supra, and for that matter, *every court which has ever undertaken to estimate damages resulting from the loss of future earnings, were concerned with the*

amount of 'pecuniary losses' sustained by an aggrieved party. The crucial issue, is not, as respondent would have us believe, simply whether libellant would ever have received any of that portion of decedent's future earnings which would have been withheld for taxes. Rather, the crucial issue is *whether a court can predict with sufficient certitude* [*certainty*] *just what portion of decedent's earnings would have been placed beyond libellant's reach by future tax laws so as to permit the court justly to reduce the damage award which libellant would otherwise be entitled to.* . . . Because of *the speculative nature of any deduction for future income taxes,* the court below should calculate libellant's damage award on the basis of her husband's *future gross income before taxes.*" (Emphasis added).

IV.

PERMITTING SPECULATION ON THE IMPACT OF FUTURE TAXES WILL RADICALLY ALTER THE SYSTEM OF INJURY COMPENSATION THROUGHOUT THE ENTIRE COUNTRY.

Contrary to petitioner's contention, there is no emerging trend in favor of the "net earnings" rule in the various state and federal courts across the country. The list of "many courts" which petitioner contends have adopted a "net earnings" rule (Pet. Br. 14 ft. nt. 5) is not persuasive: *British Transport Comm'n.* v. *Gourley,* (1956) A.C. 185, 3 All E.R. 796 is plainly inapplicable since in Britain damages are traditionally assessed by the court and an award of attorneys fees is made to the prevailing party. See: 63 ALR 2d 1393, 1397. The two federal appeals court decisions cited by petitioner: *Burlington Northern Inc.* v. *Boxberger,* 529 F.2d 284 (9th Cir. 1975) and *LeRoy* v. *Sabena Belgian World Airlines,* 344 F.2d 266 (2d Cir. 1965) did not in fact adopt a flat "net earnings" rule but applied the so-called "modified gross earnings" principle enunciated in *McWeeney* v. *York, N.H. & R.R. Co.,* 282 F.2d 34

(2d Cir. 1960). Even if *McWeeney* were followed, the "gross earnings" rule observed by the Illinois trial court would still be proper because decedent's annual earnings placed him in the lower income tax brackets.

Petitioner fails to cite a single case in which any court has squarely held that the "net earnings" rule should be applied in *all* cases. Petitioner's quotation from *Burlington Northern Inc.* v. *Boxberger,* 529 F.2d 284, 294 (9th Cir. 1975) (Pet. Br. 32) is inappropriate. The quotation is dictum that a "net earnings" rule might be preferable, but the court in fact followed the "modified gross earnings" test of *McWeeney.*[8] Petitioner's quotation from *Floyd* v. *Fruit Industries,* 144 Conn. 659, 136 A.2d 918 (1957) (Pet. Br. 23) is out of context. In *Floyd,* which preceded *McWeeney,* the Connecticut Supreme Court did not posit a net earnings rule for *all* cases, but held that, where the tort victim's income was substantial ($50,000 per year in 1957), the offset of income taxes should be considered. Query, whether the court would have so held if the income were substantially less?

Most curious are petitioner's citations in support of its claim that "many courts" have adopted a "net earnings"

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[8] Examination of petitioner's other citations reveals that those courts did not adopt the "net earnings" rule, but variations of the *McWeeney* modified "gross earnings" approach: In *British Transport Comm'n* v. *Gurley,* (1956) A.C. 185, 3 All E.R. 796, the Court noted that income taxes would have significant impact upon the amount awarded. Thus the case is the British version of the *McWeeney* rule. *LeRoy* v. *Sabena Belgian World Airlines,* 344 F.2d 266 (2nd Cir. 1965), *Cox* v. *Northwest Airlines, Inc.,* 379 F.2d 893 (7th Cir. 1975), and *Burlington Northern Inc.* v. *Boxberger,* 529 F.2d 284 (9th Cir. 1975) (all cited by petitioner's Br. 23, ft. nt. 16 were all applications of the *McWeeney* criterion. *Sanchez* v. *Denver & Rio Grande WRR,* 538 F.2d 304 (10th Cir. 1976) held that income tax consideration should be left to the trial court's discretion. (538 F.2d at p. 315).

rule, of *Dempsey* v. *Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952) and *Geris* v. *Burlington Northern,* supra. Far from adopting the "net earnings" rule, the court in *Dempsey* flatly refused to permit the jury to consider the impact of taxation on future earnings and held:

> "[T]he general rule that an award of damages for loss of future earnings should be based strictly on actual pecuniary loss cannot be rigidly adhered to so far as it may be impossible to compute with reasonable accuracy the amount of income tax liability that may attach thereto. . . . *Too many unforseeable and variable factors would enter into any attempted computation of income tax liability on loss of future earnings to permit of any reasonably accurate estimate thereof.*" (251 S.W.2d at pp. 43-45) (Emphasis added).

and in *Geris* the Supreme Court of Oregon observed, in rejecting the "net earnings" position:

> "[N]o federal court has ever held that evidence of the projected effect of taxes on plaintiff's damages is *always* admissible." (561 P.2d at p. 177), and
>
> "At least 29 state courts have also considered this specific question. The vast majority hold that evidence of the impact of taxation on plaintiff's damages is not admissible." (ft. nt. 4).

The Oregon court is correct. There exists no emerging trend among either state or federal jurisdictions to support petitioner's contention that the respondent's recovery should be "strictly limited" to the net pecuniary loss to decedent's beneficiaries.

A further consideration is the effect that any change in the prevailing "majority rule" will have on other forms of injury compensation. As we have stated before the Congressional intent to benefit injury victims with a tax exemption is clear. Awards for personal injury lawsuits are not the only exception. Workmen's compensation benefits, Social Security disability awards, insurance disability awards and medical and life insurance payments are based on gross wages and are also exempt. Since the intent to bestow a benefit on any injured person is clear, a change of that policy by this Court with respect to personal injury lawsuits will obviously effect all types of injury compensation, if all injured parties are to be treated equally. Surely the underlying social policy of full compensation to injury victims will be frustrated if those who are required by law to compensate injured persons obtain the tax benefit intended for the injured party by Congress.

V.

IF TAXES ARE TO BE DEDUCTED FROM PERSONAL INJURY AWARDS OTHER OFFSETTING FACTORS MUST BE TAKEN INTO ACCOUNT TO MAKE THE PLAINTIFF WHOLE.

The Deduction of Taxes is Not the Only Collateral Matter to be Considered if Respondent is to Receive the Full Recovery Mandated by the F.E.L.A.

> "[S]ince the aim of the legal rule that would permit a jury to take future tax consequences into account in fixing the amount of an award is to determine the *net* loss to a plaintiff, a logical sequel would mandate that a jury be permitted to know the consequences to the plaintiff of the latter's obligation, customary in personal injury and wrongful death litigation, to pay attorney's fees from the award—a consideration that is now deemed so impermissible that its use by the jury constitutes jury misconduct, necessitating reversal of the judgment." (Emphasis the court's). *Rodriguez* v. *McDonnell Douglas Corp.,* 151 Cal. Rptr. 399, 423 (1978).

Once again the inherent inconsistency in the position of the Petitioner is highlighted by the "half measure" approach which it takes in defining what constitutes "full

recovery." There exists no rational basis for the claim that taxes should not be considered a private matter between the taxpayer and the government, but that the fees and costs necessarily incurred in the prosecution of litigation are a private matter between attorney and client and not a relevant factor in determining the amount of the Respondent's recovery. The railroad by its own admission concedes that the purpose of the award is to make the Respondent whole. Yet this admittedly negligent tortfeasor refused to provide to the Respondent a full recovery without extensive litigation to the highest level of appeal. Because of this Petitioner cannot reasonably assert that only certain deductions for taxation should be computed to reduce the award, while ignoring other relevant collateral matters which ultimately affect the amount of the recovery which the Respondent will receive. Such an approach severely prejudices the party who has been wrongfully injured, does not provide full recovery, and gives a windfall to an admitted wrongdoer.

Similarly, a true net loss rule would require thorough and realistic consideration of the factor of inflation. While Petitioner argues that "the remedy would be in making future inflation a relevant consideration, not in refusing to allow the jury to consider factors such as income tax" (Pet. Br. 30, ft. nt. 21), the vice of such suggestion is to open wide the courthouse door to a multiplicity of speculative and collateral issues beyond the reasonable and practicable scope of personal injury trials.

Finally, Petitioner's suggestion that permitting consideration of attorney's fees would require Congressional action in view of the firmly entrenched practice of excluding attorney's fees from the jury, is not helpful. For the same reason, in view of the firmly entrenched practice of excluding income tax considerations from personal injury trials,

it is also reasonable to assert that Congressional action should also be required to permit consideration of tax consequences.

VI.

THE McWEENEY RULE IS PREJUDICIAL AND ITS APPLICATION WOULD INTRODUCE SPECULATION DETRIMENTAL TO PROVIDING FULL COMPENSATION TO AN INJURED PLAINTIFF.

For the reasons outlined below, it is the position of the Respondent that the adoption of a "McWeeney" type rule would introduce speculation detrimental to providing full compensation to an injured plaintiff. However, if the implementation of a modified gross earning rule is deemed appropriate, the adoption of that rule should in no way reverse the outcome of the instant litigation. In *McWeeney* the court held that income taxes should *not* be deducted in "the great mass of litigation at the lower end of the income spectrum." (282 F. 2d at p. 39).[9] Therefore, in the instant case, since the record is entirely devoid of any showing that taxation would have significant impact with respect to the calculation of future lost wages, there is no basis for the contention that the Petitioner was prejudiced by the use of the "gross wage" standard as the measure of damage for the computation of future wage loss.

If this Court recognizes the principle that Congress intended to benefit persons injured through a tax exemption for personal injury awards, then the introduction of a "modified gross earnings" rule would prejudicially affect

[9] In 1960 the *McWenney* Court was of the opinion that if a plaintiff had an earnings potential of $100,000 per year deductions for future taxation might be of some consequence. (282 F.2d at p. 38). Decedent's annual projected lost income for the year 2000 in the instant litigation, as computed in 1976, was less than one-half that amount.

the benefit which was intended to be conferred. The IRS exemption does not apply only to injured plaintiffs in a certain tax bracket. It applies generally. Therefore, any ruling which would confer the benefit to a certain class of plaintiffs, but eliminate it for others is a denial of equal protection. To permit hundreds of individual trial judges across the country to speculate as to when annual gross income is "substantially" affected by taxes would hardly bring a uniformity in damage awards, which the Petitioner claims that it desires. If left to the discretion of the individual trial judge, local experience, bias and prejudice will create a marked differential in what plaintiffs with identical earning histories may recover as damages. The Congressional benefit conferred through the tax exemption should not be dependent upon a plaintiff's tax bracket.

VII.

IRRESPECTIVE OF FUTURE CHANGES IN THE METHOD OF COMPUTATION OF LOSS OF EARNINGS THE DEFENDANT IN THE INSTANT LITIGATION IS NOT ENTITLED TO A DEDUCTION FOR FUTURE TAXES.

A. Petitioner's Offer of Proof with Respect to the Issue of Future Taxes Was Deficient.

There is no competent evidence in the instant record to justify Petitioner's position that the application of the "net earnings" rule would have resulted in any significant reduction of the jury verdict. The "offer of proof" made by the attorney for the Petitioner merely consisted of an unsupported statement that there would be a reduction of $57,000 (A-35-36) in the amount of decedent's lost earnings if the impact of future taxation was considered. No testimony was offered with respect to a number of variables, including the type and number of exemptions and

deductions or the applicable rates of taxation over the decedent's life expectancy, to substantiate this conclusion. Absent such data, the trial court was unable to determine the competency of the income tax figures proffered by Petitioner. Therefore, under State law, the offer of proof is clearly insufficient to establish that any prejudice resulted to Petitioner by the Court's refusal to admit evidence concerning the impact of taxation on decedent's lost earnings.

> "To some extent, the requisite formality of an offer of proof will depend upon the circumstances of the particular case. Where it is obvious that the witness is competent to testify to a fact, and it is obvious what his testimony will be if he is permitted to give it, a brief statement by counsel may suffice. *Schusler* v. *Fletcher*, 74 Ill.App.2d 249, 253, 219 N.E. 2d 588 (1966). In a case such as this, however, where it is by no means clear what the witness will say, or what his basis will be for saying it, the offer of proof must be considerably more detailed and specific than the statement counsel made here. Only in this way can a reviewing court know what was excluded and determine whether the exclusion was proper. (Emphasis added.) *Hession* v. *Liberty Asphalt Products, Inc.*, 93 Ill. App. 2d 65, 71, 235 N.E. 2d 17, 20 (1968).

See also *Austin Liquor Mart, Inc.* v. *Dept. of Revenue*, 18 Ill. App. 3d 894, 906, 310 N.E. 2d 719 (1974).

Since the Petitioner's entire argument is predicated on the erroneous assumption that the "net earnings" rule is to be applied in all F.E.L.A. cases, and since the record in the instant case is totally devoid of any evidence which indicates that the application of the "gross earnings" rule operated to prejudice the Petitioner, there is no basis for the claim that the verdict was excessive.

B. The Testimony of Petitioner's Expert Would Have Been Barred in Any Event for Failure to Comply with Court Orders and the Illinois Supreme Court Rules Concerning Discovery Procedures.

(a) Notice to Parties et. al., The appearance of a party or a person who at the time of the trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at the trial of documents or tangible things. If the party or person is a non-resident of the county, the court may order any terms and conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in rule 219(c) that may be appropriate. Ill. Rev. Stat. 1971 ch. 110A, par. 237(b).

(b) Failure to Comply with Order or Rules. If a party or any person at the instance of or in collusion with a party, unreasonably refused to comply with any provision of rules 201 through 218, or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(iv) that a witness be barred from testifying concerning that issue; Ill. Rev. Stat. 1971 ch. 110A. par. 219(c)(iv).

During the trial of this action when the attorney for the Petitioner attempted to introduce the testimony of its actuary, counsel for the Respondent properly objected to this attempt, since the attorneys for the Petitioner had not complied with the requirements of Illinois Supreme Court Rule 237 and the trial court's order concerning the disclosure of witnesses. (App. pp. 77-79). Because of this failure, and since the record is totally devoid of any other evidence of what, if any, impact future taxes may have had on the award, Respondent is entitled to the full amount of the judgment which the jury determined she was to receive.

VIII.

INSTRUCTING THE JURY THAT AN AWARD FOR PERSONAL INJURY IS TAX EXEMPT DENIES A PLAINTIFF FULL COMPENSATION FOR HIS INJURY.

A. The Proposed Instruction is Prejudicial and Will Deny Plaintiffs Full Compensation for Their Injuries.

"Further, the jury was correctly instructed on the measure of damages, being told specifically the elements that they should consider in awarding damages. Hence, unless it be assumed that they might not follow the instructions, there could be no purpose in mentioning anything about the award not being subject to Federal income tax. However, by the very nature of the jury system this court cannot indulge the presumption that juries do not follow the instructions of the courts.

It does not necessarily follow that the argument is proper because it correctly states the law. For if the defendant's argument is proper on the basis that it tells the jury what the law is then what objection can there be for plaintiff's counsel to state that the expense of trial is not provided for in the instruction concerning damages, that the cost of medical witnesses is not paid by the defendant, that the expense of taking depositions, as well as court reporting at the trial, must be borne by the individual litigants, that the fees of plaintiff's attorney are not recognized as an element, that the defendant can deduct any award it pays from its

> income and excess profits tax return and that the amounts of awards are allowed as expenses in providing for increasing railroad fares? This could be developed ad infinitum, and all this is the law." *Hall* v. *Chicago & Northwestern Railway Co.*, 5 Ill. 2d 135, 125 N.E. 2d 78, 85 (1955).

There exists no reason for the assumption that jurors automatically disregard the court's instructions with respect to elements of damages to be awarded to an injured plaintiff and overcompensate plaintiff for the amount of an assumed tax. On the contrary, it must necessarily be assumed that jurors follow the court's instruction. It is also reasonable to assume that jurors are aware of the tax exemption. For example, the instruction book for preparing individual tax returns, which is available to all taxpayers, including potential jurors, clearly sets forth that damages are exempt. (I.R.S. Publication 17, Your Federal Income Tax 1979 Edition, ch. 17, p. 11). Given these well founded premises, the Petitioner has totally failed to demonstrate the need for a cautionary instruction.

Rather, the proposed instruction is a half measure which will prejudice a plaintiff and deny full compensation, as it will cause jurors to attempt to adjust an award, reducing it by an amount of an imagined tax. Since freedom of taxation on the award is intended as a benefit to the injured party, it is the wrongdoer who will receive a windfall to the detriment of the Respondent. Accordingly, to instruct the jury that the award is tax free will defeat the purpose of the Congressional benefit and deny the full compensation due to the Respondent.

B. The Proposed Instruction is Not a Correct Statement of the Law.

If a jury is instructed that an award is tax free such instruction will further prejudice an injured party, because it is only a half measure, since it does not further

state that any interest earned on the award is taxable as ordinary income. Because all damage awards must be reduced to present value to take into account the earning power of a lump sum award, it is implicitly assumed that the award will be invested and produce income which will replace the income lost over the work life expectancy. Since the interest earned on the lump sum is taxable to the recipient, any instruction which advises the jury that the award is non-taxable, must also explain that it is the lump sum which is not taxed, but any income earned on that award will be susceptible to ordinary income tax. Unless this is done respondent will be penalized by the jury's assumption that she will never pay any tax for the duration of her life, and thereby deny her the full compensation to which she is entitled for this injury.

C. The Jury in the Instant Case Was Properly Instructed As to the Measure of Damages.

> "The plaintiff Kandythe Liepelt brings this action in a representative capacity by reason of her being the administrator of the estate of Delroy Liepelt, deceased. The persons she represents are the widow and next of kin of the deceased, namely, Kandythe Liepelt, Carolyn May Liepelt, Marilyn Kay Liepelt, Corey Allen Liepelt and Kyle Stanton Liepelt. They are the parties in interest in this lawsuit and in that sense are the real plaintiffs, whose damages you are to determine if you decide for the administrator of the estate of Delroy Liepelt.
>
> If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for any pecuniary loss they have suffered and for any pecuniary loss they are reasonably certain to suffer in the future by reason of the death of the decedent.

In arriving at the amount of damages for the loss of future pecuniary benefits, you must determine the present cash value of the future pecuniary benefits the decedent's survivors were reasonably certain to receive, making allowance for the earning power of money.

To determine the pecuniary loss suffered by each survivor as a result of the death of Delroy Liepelt, the decedent, you should consider what benefits of pecuniary value, including money, goods and services, the evidence shows that the decedent customarily contributed to each survivor. You should also consider what the decedent was earning and what he would have been likely to earn in the future, in view of his earning capacity, habits of industry and thrift, his health, his age, and life expectancy at the time of his death.

You should also consider the personal expenses of decedent and other deductions from his earnings. Consider also how long each survivor would have been likely to receive pecuniary benefits from the decedent if he had lived. Consider also all other facts shown by the evidence which aid you in determining what pecuniary benefits it might reasonably be expected each survivor would have received from the decedent, if the decedent had not met his death.

Some of the survivors are the minor children of the decedent. As to these survivors, you may award an amount to compensate the children for the pecuniary value of any loss of care, attention, instruction, training, advice, and guidance the decedent would have been likely to give his children during their minority if decedent had continued to live.

The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of Delroy Liepelt. (App. 83-84) (Emphasis added.)

The jury in the instant case was properly instructed as to the elements of damage which it should consider in connection with the death of Delroy Liepelt. There exists no basis for the assumption that the award was excessive, or that it included compensation for other than those factors properly described in the damage instruction. The Respondent presented ample evidence on all elements of damage to support the award which the jury rendered. Future loss wages was only one of the factors which the jury was asked to consider in connection with the items of damage, and therefore, no basis exists for the assumption that Respondent was compensated for an imaginary tax. Indeed, the jury was asked by counsel for the Respondent for an award of $1,000,000.00. It could just as easily be hypothesized that the jurors deducted $225,000.00 to reduce Respondent's award for an amount of future taxes that would not be collected.

Realistically there is no reason to assume that the jury disregarded the instruction given to them in this case, or that juries routinely disregard instructions on damages or on other issues in personal injury cases. That is tantamount to saying that no party to a personal injury lawsuit ever had a fair trial, which is obviously not correct. One must believe that jurors customarily follow the court's instructions and award damages in accordance with the elements outlined therein. The instant instruction contained no reference to taxes, so there exists no basis for assuming that the Respondent received additional compensation for an imagined tax. Further, the question of an excessive verdict has not been presented to this court for its consideration, so there exists no rationale for the Petitioner's contention that the ward was improper for all the elements of loss which were demonstrated at trial.

IX.

IT WAS NOT REVERSIBLE ERROR TO REFUSE PETITIONER'S INSTRUCTION.

To permit the introduction of evidence concerning the impact of taxes on future loss of earnings or to instruct a jury that an award of damages is not subject to taxation would be a radical departure from the manner in which damage awards are assessed in the vast majority of state courts and the majority of the federal circuits. At the time this case was tried the evidence which the Petitioner sought to introduce and the instruction which it tendered would have only been permitted in a small minority of the courts in this country. Therefore, the trial court and the Respondent correctly relied on the prevailing consensus of legal decisions with respect to these two questions. If there is to be a departure from the precedents followed by the majority of jurisdictions, it should not affect this litigation. As the Court in *Dempsey* v. *Thompson,* 251 S.W.2d 42, at pp. 45-56 (Mo. 1952), noted:

> "It cannot be demonstrated that the jury did not follow those instructions, and our holding that the refusal to give the additional cautionary instruction hereinabove discussed is not based on any assumption the jury did not follow given Instructions Nos. 1 and 5. Rather, it is based on the theory that such an instruction should be given in order to avoid the imminent possibility of juries being led astray due to their likely ignorance of the fact that awards such as is here involved are not subject to income taxes. Under these circumstances . . . it would be harshly unjust to subject plaintiff to the ruling herein made. Therefore, we hold that this ruling shall be prospective only."

Similarly, in the instant case the Petitioner has completely failed to demonstrate that the jury did not follow the instructions given to it by the Court, and the record is

totally devoid of any indication that future taxes would have played any significant role in the computation of the decedent's lost wages. Therefore, this award must be affirmed.

Conclusion

For the foregoing reasons the judgment of the Illinois Appellate Court, First District, First Division, should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM 1978
No. 78-1323

Norfolk and Western Railway Company,
Petitioner,

vs.

Kandythe J. Liepelt, Administratrix
of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

PETITIONER'S REPLY BRIEF

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Internal Revenue Service, Publication 17, Your Federal Income Tax, 1979 Edition, (1979)	25
Internal Revenue Service, Preliminary Statistics of Income 1976: Individual Tax Returns Publication (4-78)	16
National Railway Labor Conference, Wage Statistics, Annual 1977, Operating Employees (1978)	16
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PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondent has not offered any arguments that justify either of the income tax-related rulings of the Illinois courts.

I. The Illinois Courts' Refusal To Allow Evidence Of The Taxes That Decedent Would Have Paid On His Estimated Earnings Violated The FELA.

The first question in this case pertains to the formula for determining the amount of damages to be awarded in actions under the FELA. The Illinois courts held—and respondent now contends—that a FELA wrongful death claimant has a federal right to recover, as part of his damages, the entire amount of the income taxes that the decedent would have paid out over his lifetime, and thus that a jury may *never* be allowed to exclude the amount of such income taxes from a

decedent's recovery, regardless of the degree to which income taxes would have been paid on his earnings. To dispose of the first question presented in this case, this Court need only decide whether this absolute prohibition of any consideration of income taxation can be squared with the fundamental principle that damages are to be compensatory only and with the established rule—which respondent has simply ignored—that all other personal expenditures be excluded from such awards.

A. Unless A Decedent's Income Taxes Are Excluded From The Wrongful Death Award, The Damages Will Exceed The Amount Of The Beneficiaries' Pecuniary Loss And Thus Be Inconsistent With The FELA.

Respondent has advanced a series of arguments to the effect that the FELA itself requires the adoption of the Illinois rule. However, these arguments are patently inconsistent with the statutory prescription that FELA wrongful death awards are to compensate the statutory beneficiaries "for the loss and the damage resulting to them financially by reason of [their decedent's death] ... and for that only." *Michigan Central R.R. Co.* v. Vreeland, 227 U.S. 59, 68–72 (1913).

1. "Gross Earnings" Is Not Now And Never Has Been The Measure Of Wrongful Death Damages.

Respondent's defense of the Illinois rule is premised on her repeated assertions that the decedent's estimated lost "gross" earnings must serve as the measure of FELA wrongful death awards. (*See, e.g.*, Respondent's Brief, at 9.) It is manifest, however, that "gross earnings" are not now and never have been the measure of these damages. Indeed, respondent's own presentation of her case to the jury was inconsistent with any such theory.

Because wrongful death awards under the FELA (and under all statutes modeled on Lord Campbell's Act, 9 and 10 Victoria c.93) are intended to compensate the decedent's statutory beneficiaries for *their* financial losses, the size of the award is determined by the value of the *contributions* the decedent would have made to his beneficiaries, not the amount of his *gross* earnings.[1] *See* H. F. Harper & F. James, The Law of Torts, §25.14 at 1329.

The corollary to the principle that the beneficiaries' lost receipts measure the wrongful death recovery is that the tribunal must exclude from the award all amounts that the decedent never would or could have contributed to his beneficiaries. Thus, courts have always been required to permit evidence of the decedent's personal expenditures and to instruct the jury to deduct them from the decedent's gross earnings in determining the amount of the beneficiaries' loss.[2] *See Kansas City Southern Ry.* v. *Leslie*, 238 U.S. 599, 604 (1915); F. Harper & F. James, *supra*, §25.14 at 1329; Illinois Pattern Jury Instructions, Civil §160.15 (2nd Ed. 1971). Indeed, this rule is so well established that not only did the instructions given in this case direct the jury to deduct the amount of the decedent's personal expenditures from his

---

[1]That the whole focus of the assessment of wrongful death damages is upon the contributions the decedent would have made to his beneficiaries is illustrated most clearly by this Court's early holding that "the rule for the measurement of damages must differ according to the relation between the party plaintiff and the decedent." *Michigan Central R.R.* v. *Vreeland*, 227 U.S. 59, 72 (1913). This holding refutes any notion that claimants are entitled to some fixed amount of the decedent's lost earnings and confirms that the beneficiaries' lost receipts measure the recovery.

[2]Notably, because these amounts include sales taxes and other excise taxes, some of the taxes a decedent would have paid out over his lifetime are already being deducted from awards, even under the Illinois courts' approach.

estimated gross earnings in determining the amount of the award (A84), but respondent herself proposed that the instruction be given (A85). She made this request, moreover, because her own pecuniary loss evidence, presented through an expert witness, had excluded her decedent's personal expenses in calculating the amount of such loss (A55-A56).

The critical point is that income taxes are simply a specific kind of personal expenditures, being payments to satisfy a duty to government. Just as the statutory standard requires a deduction from gross earnings of other personal expenditures, so too it requires a deduction of the income taxes a decedent would have paid over his lifetime. *See Kansas City Southern Ry.* v. *Leslie, supra.* For the taxes a decedent would have paid on his gross earnings over his lifetime, like his other personal expenditures, all represent portions of his gross earnings which never could have been contributed to his statutory beneficiaries if the fatal accident had not occurred[3] and which must, accordingly, be excluded from any award.

2. The Exclusion Of Taxes From The Award Does Not Confer A Windfall On A Defendant

An argument that is closely related to respondent's repeated assertions that "gross earnings" should measure her award is that any other measure of recovery would confer a windfall on petitioner. She reasons that, if there had been no fatal accident, the railroad defendant would have been

[3]Respondent's argument that a railroad must always be required to pay out as damages the entire amount of the decedent's gross earnings is also flatly inconsistent with the fact that, under the FELA, a railroad will be liable in damages for the wrongful death of an employee *only if* he is survived by one of three classes of dependent relatives. 45 U.S.C. §51. The critical point is that Congress intended to redistribute losses, not punish railroads.

required to pay the decedent his gross earnings, and that gross earnings must measure the recovery or the defendant would profit from its wrong. (Respondent's Brief, at 9).

This argument simply ignores that the FELA prescribes that damages be measured by the statutory beneficiaries' pecuniary loss. The exclusion from the award of the income taxes the decedent would have paid would no more confer a windfall on the defendant than does the established practice of excluding the decedent's other personal expenditures from the award. Both are simply consequences of the Congressional decision that the FELA awards are to be measured by the amount of the beneficiaries' lost receipts.[4]

Respondent, in any case, is simply wrong in suggesting that a defendant will "profit from its wrong" if it were permitted to pay out in damages a sum that is less than the present value of the decedent's lost *gross* earnings. The point this argument overlooks is that, following the accident, petitioner will not only pay damages equal to the value of the beneficiaries' financial losses, but also will pay "someone else to perform the services" decedent performed before his death. *British Transport Comm'n* v. *Gourley*, [1956] A.C. 185, 3. All

[4]Indeed, it is *respondent's* position which would confer windfalls and produce the incongruous results. For example, the FELA authorizes a decedent's parents to sue for wrongful death if there is no surviving spouse or children. See 45 U.S.C. § 51. If respondent were correct that FELA death claimants have a federal right to recover, as part of their damages, the income taxes their decedents would have paid, it would mean that such parents will recover—in addition to the pecuniary loss they would suffer over *their* life expectancies—the present value of the income taxes the decedent would have paid over *his* (presumably much longer) life expectancy. Carried to its logical extreme, respondent's position would require holding that a statutory beneficiary who would not have received *anything* from the decedent will have a right to recover as his "damages" the present value of the income taxes his decedent would have paid over his lifetime.

E.R. 796, 809 (Lord Reid).[5] Whatever the measure of damages, petitioner will be worse off financially following the accident than before.[6]

3. Public Policy Considerations Do Not Support The Illinois Courts' Holding

Respondent hints in her brief that considerations of public policy and developments in the law of torts require awarding, as part of a wrongful death claimant's damages, the entire amount of income taxes his decedent would have paid out over his lifetime. All such considerations, however, compel the exclusion of such taxes from the awards and the continued adherence to a pecuniary loss measure of damages.

In support of her public policy arguments, respondent quotes at length from *Kernan* v. *American Dredging Co.*, 355

[5]The decedent's replacement, moreover, will pay income taxes to the government on those wages, so the U.S. Treasury will not suffer a revenue loss as a result of any such death. Thus, respondent's suggestion to the contrary notwithstanding (Respondent's Brief, at 10), it is not surprising that the Internal Revenue Code has no provision for the collection of the taxes the decedent would have paid on his earnings, and the absence of such a provision is assuredly not a reason to adopt the Illinois rule.

[6]Nor is there any merit to the related argument that the income taxes a decedent would have paid on his earnings would be a "collateral issue" in a death case because taxes are a matter between the taxpayer and the government. (Respondent's Brief, at 7.) This argument too simply misses the point. The decedent's projected personal expenditures on, for example, food, clothing, and shelter, are excluded from death awards, even though the price paid for such goods is a matter between the purchaser and the merchant. There is no justification for treating a decedent's income taxes any differently. This consideration, moreover, disposes of any argument based on any so-called "collateral source" rule.

U.S. 426, 431–432 (1958) (Respondent's Brief, at 6). There, this Court, in construing the Jones Act, noted that the FELA had been interpreted as favoring compensation and that the concept of fault had thus been diluted so as to ease recovery for losses occasioned by operations of railroads.[7] However, the liberalization of the rules governing a railroad's *liability* to its employees provides no support for the liberalization of the measure of damages. On the contrary, quite apart from the fact the FELA is intended to redistribute losses, not punish railroads, the constant expansion of the conditions under which railroads are held liable for industrial accidents has given the FELA elements of a system of social insurance and has made it all the more essential that damages continue to be limited to the value of the beneficiaries' pecuniary loss. Liability determinations having been divorced from considerations of blameworthiness, there can be no justification for requiring a railroad to pay out in damages any amount in excess of the loss suffered as a result of the employee's death. *See* II F. Harper & F. James, The Law of Torts, § 25.22, at 1346.

Of course, the critical consideration is that the FELA has clearly prescribed a pecuniary loss standard. As this Court recently stated in a similar context, "we need not pause to evaluate . . . policy arguments. Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 623 (1978) (holding that damages for "loss of society"

[7]*See generally* Alderman, What The Supreme Court Has Done To The Old Law of Negligence, 18 Law & Contemp. Prob. 110 (1953); *Brown* v. *Western Ry.*, 338 U.S. 294 (1949) (presence of clinker of coal in railroad yard is actionable negligence).

are to be excluded from recoveries under the Death On The High Seas Act).[8]

B. There Is No Justification For Treating Income Taxation Differently From Other Personal Expenditures.

In light of the patent inconsistency between the ruling below and the statutory requirement that all the decedent's other personal expenditures be excluded from the award, it is not surprising that the briefs filed in support of the Illinois courts' rulings have been primarily devoted to advancing arguments which, if valid, might justify treating the amount of a decedent's income tax liability differently from his other personal expenditures. None of these arguments, however, will withstand analysis.

1. There Is Nothing In §104(a) Of The Internal Revenue Code That Modifies The Damages Principles Established By The FELA.

The principal argument that has been advanced in defense of the Illinois courts' holding is that §104(a) of the Internal Revenue Code[9], which provides that personal injury awards

[8]This decision severely limited the Court's earlier holding in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), relied upon by respondent (Respondent's Brief at 14 n. 6). It bears noting, moreover, that while departure from the statutory standard in *Mobil Oil Corp.* v. *Higginbotham* could have advanced the objectives of the general maritime law and promoted uniformity, *see* 436 U.S. at 626–630 (Marshall, J., dissenting), no comparable argument could be made in this case. The FELA is the exclusive authority for the measure of damages in actions falling within its provisions. *See, e.g., North Carolina R.R. Co.* v. *Zachary*, 232 U.S. 248 (1914); Petitioner's Brief at 15–19.

[9]Although a portion of this statute was quoted in Petitioner's Brief at 2-3, it is apparent, in light of the arguments made in Respondent's Brief, that the whole statute is relevant, and it is set out in its entirety in the Appendix to this reply brief, *infra*, at p. 27.

are not subject to income taxation, also prohibits excluding from wrongful death awards the amount of income taxes the decedent would have paid over his lifetime. Respondent contends—in arguments scattered throughout her brief—that §104(a) confers a federal right upon all wrongful death claimants (and indeed upon all personal injury and sickness claimants) to recover—in addition to the amount to which the claimant is entitled under the statutory tort standard—the entire amount of the income taxes that would have been paid on any lost earnings. The claim, in short, is that §104(a) impliedly repeals the statutory standards for determining the amount of a wrongful death claimant's recovery. This argument seriously misconceives the operation and effect of §104(a), for it confuses the question of the measure of damages with that of the taxability of the award. Acceptance of respondent's interpretation of §104(a), moreover, would not only affect the measure of FELA damages but would fundamentally alter *all* forms of personal injury compensation in this country.

There is nothing in §104(a)'s terms or history which even begins to suggest that it could prescribe how a personal injury award is measured. The statute provides only that certain cash receipts are not to be included in a taxpayer's adjusted gross income: *i.e.*, "the amounts received under workmen's compensation acts as compensation for personal injuries or sickness," §104(a)(1); "the amounts of any damages received (whether by suit or agreement) on account of personal injury or sickness," §104(a)(2); and the amounts received for personal injury or sickness "through accident or health insurance" as a "pension, annuity, or similar allowance." §104(a)(3) & (4). The statute, quite plainly, cannot be read as dictating the formula to be used in calculating the *amount* of any of these receipts. It merely says that after

the size of the award has been determined under the applicable standards, the award itself will not be subject to a tax. Section 104(a) thus supports the continued application of the statutory standards for measuring FELA wrongful death awards. The legislative history of 104(a) is entirely clear on this point.[10]

The fallacy of respondent's basic argument is illustrated by her contention that the acceptance of petitioner's

[10]The genesis of §104(a) may be summarized briefly. Shortly after the Internal Revenue Code became effective in 1913, the Treasury Department issued a ruling that any amounts received as compensation for a personal injury were to be treated as income to the recipient and taxable as such. U.S. Treas. Reg. 33 (rev.), Art. 4, §25 (1918). Under this ruling, the entire amount of any personal injury award was taxable to the recipient in the tax year received.

The ruling, however, proved to be extremely short-lived. In response to this Court's decision in *Doyle* v. *Mitchell Brothers Co.*, 247 U.S. 179 (1918), the Attorney General and the Treasury both issued subsequent interpretive rulings that held that amounts realized as a result of personal injuries "merely take the place of capital in human ability which was destroyed by the accident, [and t]hey are therefore 'capital' as distinguished from 'income' receipts" and are exempt from taxation. 31 Ops. Atty. Gen. 304, 308 (1918); *accord*, Treasury Decision 2747, 20 Treas. Dec. Int. Rev. 475 (1918). The predecessor to §104(a) was enacted later in 1918. Revenue Act of 1918, §213(b)(6), 40 Stat. 1066. Its legislative history states that it was adopted because "under the present law it is doubtful whether amounts received . . . as compensation for personal injuries or sickness and damages received on account of such injury or sickness are required to be included in gross income," H.R. Rep. No. 767, 65th Cong., 2d Sess. 9–10 (1918), thus reflecting the existing view that such damages could not constitutionally be taxed. Although §104(a) has been reenacted several times, Congress has never attempted any further explanation for its inclusion in the Internal Revenue Code. Thus, contrary to the respondent's contention that §104(a) was enacted out of a "humanitarian concern" to increase the size of damages awards, it is quite clear that Congress' sole objective has always been only to make the various awards—however they are computed and whatever their amount—tax free.

interpretation of §104(a) would fundamentally alter all forms of injury compensation in this country, including "[w]orkmen's compensation benefits, social security disability awards, insurance disability awards and medical and life insurance payments." Respondent's Brief, at 22–23. This argument is simply wrong.[11] The amounts received pursuant to these awards are made exempt from taxation by §104(a), and they will continue to be exempt from taxation whether or not this Court agrees with petitioner as to how FELA damages should be measured.[12]

[11]Moreover, if *respondent's* interpretation of §104(a) were correct, it would mean that *all* personal injury and sickness claimants *must* receive, as part of their awards, the amount of taxes that would have been paid on lost earnings. Such a holding would alter all forms of compensation in this country in which the claimant's recovery is not based on the entire amount of lost *gross* earning.

[12]Even if respondent's argument concerning the meaning of §104(a) were valid, it would still have no applicability to this case, for this statutory provision neither applies to wrongful death awards nor could affect their taxability.

By its terms §104(a) applies only to amounts received by reason of "personal injury or sickness," and this language excludes death awards. Accordingly, the Internal Revenue Service has twice held that although death awards are tax exempt, the reason is that they are not income within the meaning of §61 of the Code, not that §104(a) exempts them from tax. *See* Rev. Rul. 54-19, 1954-1 Cum. Bull. 179 (holding, respondent's misstatement to the contrary notwithstanding (Respondent's Brief, at p. 8 n.2), that a death award does not "constitute taxable income to the dependents who received the proceeds"); VII-27-3788, I.T. 2420, VII-2 Cum. Bull. 123 (1928) (same); 26 U.S.C. §61. That the Internal Revenue Service is correct that a death award could never be included in "gross income" is clear from the principles that determine the taxation of judgments generally, for an award based on the *contributions* the decedent would have made to his dependent relatives if the fatal accident had not occurred is not a substitute for any "income" that the death claimant would have "realized." See *Hort* v. *Commissioner*, 313 U.S. 28, 31 (1941).

2. Consideration Of Income Taxation Presents No Greater Difficulties And Involves No More Speculation Than Do Any Other Elements Of The Award.

Respondent urges that determination of a decedent's future tax liability is so speculative and complicated that taxation should never be taken into account in computing FELA damages—no matter how great the extent to which plaintiff will be overcompensated. Respondent's Brief, at 16–20. However, no serious argument has been made that determinations concerning taxation are any more speculative or any more complicated than are other components of damages calculations.

a. Alleged Speculativeness.

The speculation argument asserts that, because there may be future changes in the tax laws, it is impossible to say with complete certainty what the effective rate of taxation would have been on a decedent's *future* earnings.[13] But it simply ignores that there is far more speculation inherent in determining what those future earnings would be (and in determining the other elements of the award) than there is in determining the effect taxation would have on the future earnings.

The major elements in determining the lost future earnings are life expectancy and future earning power. But insofar as these determinations are made with respect to any

[13]Respondent apparently concedes that there is no problem whatever in determining taxes on the decedent's lost *past* earnings—*i.e.*, those occurring between the date of the trial and the fatal accident—and that the speculativeness-complexity arguments are completely inapplicable with respect to those earnings. *See, e.g., Varlack* v. *SWC Caribbean, Inc.*, 550 F.2d 171, 177–178 (3d Cir. 1977). Because the Illinois courts excluded evidence of past as well as future taxes, a reversal would thus be required in this case. *See* Petitioner's Brief at 25 n.18.

particular decedent, they are the sheerest conjecture. The length of time any single individual will live and his earning power while alive are determined by such a multiplicity of factors—including the future actions of third parties—that the only thing which is certain about the predictions made pertaining to any single individual is that they nearly always will be erroneous and that they often will be very, very wrong.[14] But notwithstanding the speculativeness of these factors, our system of single lump sum awards requires that tribunals exercise their best judgments concerning these elements because they are of obvious relevance to the value of the loss suffered.

Against this background, no claim can be made that the future effect of income taxation is too conjectural ever to be considered in the process. Once the amount of a decedent's future earnings is determined, a tribunal would be able to determine, with at least as much accuracy as its other determinations, the extent to which future income taxation would have reduced the decedent's disposable income. "Nothing can be more certain than that there will be a federal income tax in the years to come and that it will be substantially what it is now and what it has been for many years." *McWeeney* v. *New York, N.H. & H. R.R. Co.*, 282 F.2d 34, 42 (2nd Cir. 1960) (Lumbard, J., dissenting).[15]

[14]This is even more true with respect to the other recognized elements of a death award. For example, here the jury was permitted to award damages for "lost guidance" to decedent's children even when respondent's own expert testified that there was no basis for assigning a value to this loss. See A59–A60.

[15]In an attempt to avoid this obvious conclusion, respondent lists (Respondent's Brief at 17–18) a number of changes in the Internal Revenue Code that have occurred since 1947, *e.g.*, increasing the amount of the standard deduction and personal exemptions, tinkering with the rates, and adding personal deductions which only a

(footnote continued on following page)

b. Alleged Complexity.

In urging that taxation is too complex a consideration for jurors, respondent—quoting the discredited interpretation of New Jersey law of *Huddell* v. *Levin*, 395 F. Supp. 64, 91 (D. N.J. 1975)[16] (Respondent's Brief, at 16–17)—lists a parade of tax issues that would "predictably" arise if taxation were taken into account in FELA cases, including, to list but two, the "availability of professional corporation status" and "the amount and period of withholding income from taxation under retirement plans." The suggestion that railroad employees would routinely present these tax problems is wholly unrealistic. Experience, moreover, teaches that the

(footnote continued from preceding page)

small percentage of taxpayers are able to claim. This list proves petitioner's basic point, for the changes that are referred to are exceedingly minor ones to have been made over a period of thirty years.

But the critical point is that the minor changes Congress has made over the years have not materially affected the *effective rate* of taxation. A recent Brookings Institution Study concerning federal income taxation from 1960 to 1975 concluded that, although Congress, during the years in question, repeatedly amended personal income tax laws, the effect of its actions was to take account of the "increased taxes caused by inflation" and that "[a]s a result of these changes in tax laws, effective tax rates have increased very little since 1960." The Brookings Institution, Inflation and the Income Tax, p. 153 (Aaron, ed., 1976). Of course, when there are increases in "real income"—as railroad employees have experienced—there will be corresponding increases in the effective rate of taxation. This consideration makes it all the more important that the effects of income taxation be reflected in the determination of the amount of FELA statutory beneficiaries' pecuniary losses.

[16]The *Huddell* v. *Levin* court erroneously anticipated that the New Jersey Supreme Court would hold that evidence of the decedent's tax liability may never be considered in wrongful death actions. Later that very year, however, the New Jersey Supreme Court held that the decedent's income tax liability is to be excluded from *all* wrongful death awards, *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613 (1975), so the District Court in *Huddell* v. *Levin* was reversed. 537 F.2d 726 (3rd Cir. 1976).

question of future tax liability would almost certainly be resolved on the basis of the same sort of estimates which are used to determine all other major components of the beneficiaries' loss.

The other major factors of damages awards—life expectancy, future earnings, personal expenditures, household services, and rate of return—could all be broken down into the same sort of endless array of complex subsidiary issues as can taxation. As to life expectancy, for example, one could hypothesize that there could be days of confusing expert testimony concerning the decedent's health and habits, including evidence concerning each major organ in the decedent's body and the likelihood of its having "prematurely failed". As a practical matter, however, life expectancy issues—notwithstanding their critical effect on the amount of any award—are normally resolved on the basis of standard tables. Indeed, that proof of major elements in damages computations does not degenerate into extended battles of experts over subsidiary issues is illustrated by the trial of this very case.[17]

The reason that rough estimates generally suffice—as they did here—is not that they are accepted as finely calibrated, precise measures of the elements of a claimant's loss. On the contrary, it is because notwithstanding the tendency "to talk

[17]Here, the testimony of one expert presented by respondent sufficed to show that decedent would have lived for 34 years if there had been no accident, that his wages would have been $16,800 at the date of the trial and would have increased at a rate of 5% per year, that the value of his household services would have been equal to 9% of decedent's annual gross income, that the decedent's personal expenditures would have been 10% of his gross income for one period of his life, 25% for a later period, and 50% of gross income for a still later period. (A46–A61).

It strains credulity to suggest that it would have precipitated a lengthy battle of tax experts if this same expert had gone on to testify that decedent would have paid out, *e.g.*, between 12% and 15% of his gross income in income taxes over his lifetime.

glibly of the jury's complex computations . . . we know full well that the give and take of the jury room is in round figures and does not deal in actuarial tables, decimal points, and percentages." *McWeeney* v. *N.Y., N.H. & H. R.R. Co.*, 282 F.2d 34, 42 (2nd Cir. 1960) (Lumbard, J., dissenting). That taxation is amenable to this same treatment is established by the existence of tables, referred to in respondent's brief (Respondent's Brief, at 13), indicating the percentage of gross earnings that are paid in income taxes each year by wage earners at the different income levels.[18]

But all these arguments aside, *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485 (1916), disposes of the argument that income taxation is too difficult to be taken into account in FELA cases. There, this Court held that the FELA requires that wrongful death awards be discounted to their present value—notwithstanding that performing that calculation involved "difficult mathematical computations for the ordinary juryman" and were, in the Kentucky Court of Appeals' view, "more than ought to be asked of anyone less qualified than an actuary" (241 U.S. at 489). The reason this Court held that such difficult computations had to be made is that failure to do so would have invariably overcompensated

[18]See Internal Revenue Service, Preliminary Statistics of Income 1976, Individual Income Tax Returns (4–78), p. 14. These tables show that heads of households like decedent with estimated earnings of $16,800 for 1977—the date of the trial—would, under this table, pay, on the average, approximately 12% of his earnings to the federal government in income taxes. Under these tables, the average percentage of income taxes paid for the various categories of operating railroad employees who are heads of households would, for that year, have ranged from approximately 12% for individuals at the low end of the scale (*i.e.*, incomes of a little over $16,000, *see* National Railway Labor Conference, Wage Statistics, Annual 1977, Operating Employees, p. 4 (1978)) to approximately 15% for individuals at the upper end of the scale (*i.e.*, average incomes of $29,154.04, *see ibid.*).

many FELA claimants. This principle is dispositive here. First, the amount of a decedent's income taxes will frequently be a far more significant determinant of the amount of the beneficiaries' loss than will be other recognized elements of FELA death awards—*e.g.*, the amount of the personal expenditure deduction,[19] the value of the household services he would have supplied,[20] and even the discount rate on the award.[21] Second, jurors have had personal experience in computing taxes, and will, with the aid of such expert testimony as may be supplied, find that a far more manageable task than the entirely alien one of determining the present value of future losses.[22]

3. That An FELA Plaintiff's Attorneys' Fees Are Not Included In Recoverable Damages Is No Justification For The Illinois Courts' Holding.

Ignoring income taxation cannot be justified on the theory that it is an offset to plaintiff's attorneys' fees. Not only is respondent's contrary claim flatly inconsistent with

[19]Here, for example, decedent's personal expenditures for a major period of his life were estimated at 10% of his annual gross earnings, a figure which is appreciably less than railroad laborers' average tax liabilities. *See* n. 18, *supra*.

[20]Decedent's household services were here valued at 9% of his gross earnings, which is much less than railroad laborers' average tax liabilities. *See* n. 18, *supra*.

[21]There are cases in which consideration of income taxation would have a far more significant effect on the size of an award than would reducing it to its present value: *i.e.*, cases in which the trial occurs within a few years of the decedent's projected retirement date.

[22]The suggestion implicit in respondent's argument—that juries are not competent to decide such income tax questions—is also contrary to the whole body of the jurisprudence of the FELA. This Court has stated repeatedly that, regardless of the complexity of the questions, juries must, in FELA cases, be presumed to "fair[ly] perform[ ] their constitutional functions." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 62 (1948) (Black, J.).

the American rule prohibiting a prevailing party from recovering his attorneys' fees, either directly or indirectly, *see Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975),[23] but it ignores that it would be nothing short of irrational to treat the income taxes that the decedent would have paid over his lifetime as a "proxy" for the fees that his beneficiaries will pay to their lawyer. There simply is no correlation whatever between the two amounts. One can no more defend the practice of including taxes in an award on the theory it offsets attorney fees than one could have invoked such notion to defend allowing FELA death claimants to recover their decedent's personal expenditures or allowing a Death On The High Seas Act claimant to recover for "loss of society." *See Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978).

4. The Possibility That An Adjustment Might Be Made For The Taxation Of Interest Earned On An Award Is No Justification For The Illinois Courts' Holding.

Respondent's final argument in defense of the Illinois courts' rule—which is based entirely on a misreading of language from *McWeeney* v. *New York, N.H. & H. R.R. Co.*, 282 F.2d 34, 37 (2nd Cir. 1960)—is that the exclusion from an award of the decedent's income taxes never could have a material effect on the size of an award and that these taxes may be disregarded without causing any injustice. The contention proceeds from the premise that if the income taxes the *decedent* would have paid on his *earnings* if there had been no accident were excluded from the award, it would necessarily follow that the jury must further be required to increase the

[23]The FELA Plaintiff's Bar appears to be of the view that the American rule prohibiting any recovery for attorneys' fees should be inapplicable in FELA cases. If so, they should raise the point directly and litigate it, not rely upon it in support of the inclusion in the award of amounts that cannot be justified on any theory.

damages by the amount of tax the *beneficiaries* would pay on the *interest* the *award* would earn. Respondent appears to be arguing that this "taxation of interest" adjustment would invariably offset—or largely offset—the amount initially excluded from the award. There are several basic flaws with respondent's contention.

First, respondent's contention was rejected by the very court upon which respondent relies. Although the Second Circuit held in *McWeeney* that—for a number of reasons, including the difficulties of making this adjustment—it would not require that taxes be excluded from an award in a case in which the annual lost gross earnings figure was $4,800, it stated, contrary to respondent's argument, that it would require the exclusion of a decedent's income taxes in cases in which the lost annual earnings were appreciably higher. 280 F.2d, at 38–39. Thus, in *LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2nd Cir. 1965), that court required the exclusion of income taxes from an award when the projected lost future earnings had been in the range of $16,000 to $25,000—a decision which, if followed by this Court, would control the case at bar. Plainly, the Second Circuit has rejected the position that the possibility of a "taxation of interest" adjustment to the award is a sufficient reason to hold income taxation irrelevant in all cases.

But a far more basic problem with respondent's argument is the premise that measuring damages by lost contributions (and thus excluding decedent's income taxes from the award) would make it necessary for a jury to increase the award by the amount of taxes that would be paid on any interest the damages would earn. There is simply no relationship between the two issues. The argument that the award should reflect that income tax is payable on interest could be made whether or not this Court agrees with petitioner in this case,

and the outcome of this case would not make the argument any more or less persuasive. For example, even if gross earnings (not lost contributions) were the measure of FELA wrongful death awards, an FELA claimant could argue that the damages must reflect that the interest earned on the award is taxable because, otherwise, the annual yield of the interest plus the principal would be less than the decedent's annual gross earnings. Similarly, the identical argument could be made if the statutory measure of damages were ⅔ of gross earnings or a flat $5,000 for each year of the decedent's life expectancy. All respondent has raised is the basic issue whether the formula for discounting an award to its present value should take into account the fact that interest is taxable. This issue is entirely separate and distinct from the question of how a beneficiary's loss for any particular future year is to be measured.[24]

C. The Judgment Of The Illinois Appellate Court Is Not Supported By An Independent Adequate State Procedural Ground.

Respondent belatedly argues that the issue of the validity of the Illinois ruling under federal law has not been properly preserved for review in this Court because petitioner's offer of proof concerning the testimony of Mr. Barnes was insufficient under Illinois law. The short answer to this contention is that the Illinois Appellate Court in fact decided whether the trial courts' exclusion of all evidence of income

[24]Moreover, respondent, in any case, is simply wrong that the amount of taxes that would be paid on the interest earned by a death award over its amortization period would invariably offset entirely—or even offset largely—the amount excluded from the award by reason of taxes the decedent would have paid over his lifetime. There is no correlation between the two amounts. Indeed, in many cases, *no* taxes would be paid on the interest earned by the award: *e.g.*, if the beneficiaries were minors with no other income.

taxation had violated the FELA. This ruling eliminates any basis for arguing that petitioner's federal claim was not properly preserved in the trial court, for "there can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959); *accord*, *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); see generally R. Stern & E. Gressman, Supreme Court Practice ¶3.28, at 222–24 (5th Ed. 1978).

In any case, respondent's arguments that petitioner failed to preserve its federal claim lack all substance. First, the offer of proof was plainly adequate under Illinois law, for it served its function of permitting the "reviewing court [to] know what was exclude[d] and determine whether the exclusion was proper." *Hession* v. *Liberty Asphalt Products, Inc.* v. *Dept. of Revenue*, 93 Ill. App. 2d 65, 71, 235 N.E.2d 17(1968). Not only did it set forth all the relevant information to which Mr. Barnes would have testified on direct examination, but it was also more specific than was the testimony of respondent's expert Dr. Friedman as to other elements of pecuniary loss.[25]

[25]To the extent respondent is now arguing that the trial court should have rejected the offer of proof on the ground Barnes' name had not appeared on a pretrial list of witnesses, the claim is utterly frivolous. First, respondent plainly has waived any such claim because she did not raise it in the Illinois Appellate Court. But, in any case, her contention is contradicted by the plain terms of Ill. Rev. Stat. 1977 ch. 110A, ¶219(c)(iv) which provide that the remedy of excluding a witness's testimony is committed to the discretion of the trial judge and may not, in any event, be invoked unless the party "unreasonably refused" to include the witness's name in its initial list. The colloquy in the trial court shows, beyond any question, both that the trial judge here declined to exclude the offer of proof and that the omission of Barnes from the list had been entirely understandable under the circumstances. (A77–A79).

But the most fundamental defect in respondent's argument is that she assumes, contrary to all authority, that petitioner had to make a formal offer of proof to preserve its claim that it violates the FELA for a tribunal to refuse, in computing damages, to take into account the fact that a decedent with projected earnings of $16,800 to $51,600 (*see* Petitioner's Brief, at 3-4) would have paid income taxes on those earnings if there had been no fatal accident. Any such contention is contrary to the rationale of the decisions, cited in Petitioner's Brief at 32–33, which would be dispositive if followed by this Court.[26] Petitioner raised its claim at trial in a variety of ways, including attempting to cross examine respondent's expert as to the impact of taxation on the award (A61–A63),[27] and attempting to obtain a declaration that income taxation would be held relevant to the pecuniary loss determination. (A63–A75) These other steps were plainly

[26]Respondent's statement to the contrary notwithstanding (Respondent's Brief, at 21), several courts have held that the income taxes a decedent would have paid over his lifetime must be taken into account in *all* wrongful death actions. *E.g.*, *Tenore* v. *NU Car Carrier, Inc.*, 67 N.J. 466, 341 A.2d 613, 628 (1975); *Adams* v. *Deur*, 173 N.W. 2d 100, 105 (Iowa 1969); *see Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284, 294 (9th Cir. 1975). Others have held that whether inquiry into taxation will be required depends upon the amount of the decedent's projected future earnings, and there is no question that decedent's projected future earnings of $16,800 to $51,600 fall within the range in which income taxation must be taken into account under this latter approach. *See, e.g., Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284 (9th Cir. 1975) (projected future annual earnings of $18,048 to $40,000); *Sanchez* v. *Denver & Rio Grande W. R.R.*, 538 F.2d 304 (10th Cir. 1976) (annual earnings at death of $8,300); *Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967) ($15,655 to $20,608).

[27]It is clear from the subsequent colloquy that, if cross examination regarding taxation had been permitted, petitioner would have questioned Dr. Friedman concerning the extent to which decedent would have paid income taxes on his earnings (A63–A75).

sufficient to preserve petitioner's claim. *See Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284 (9th Cir. 1975) (no offer of proof made); *Tenore* v. *NU Car Carriers, Inc.*, 67 N. J. 466, 341 A.2d 613 (1975) (defendant may show effect of taxation by cross examining plaintiff's expert).

II. The Illinois Rule That A Trial Court May Never Inform A Jury That A Damages Award Is Not Taxable Caused A Separate And Independent Violation of Petitioner's Rights Under The FELA.

Under Illinois law, it is never permissible for a trial judge to give an instruction that, because the amount awarded to the plaintiff by the jury's verdict is not taxable to the plaintiff under the federal tax laws, the jury should not add any sum of money to the amount of the verdict on account of federal income taxes. *Hall* v. *Chicago & North Western R. Co.*, 5 Ill.2d 135, 125 N.E.2d 77, 86 (1955). Under this Illinois rule, it would be reversible error to give such an instruction even if it were certain that the jury would otherwise inflate the damages award by the amount of taxes that would have been paid on it if the award were not tax-free. Notwithstanding that one can scarcely imagine a more flagrant violation of the principle that FELA damages must be limited to the amount of a beneficiary's loss, respondent defends this Illinois rule. The arguments she makes all ignore what the proposed instruction says and misconceive its effect.

A. The Illinois Rule Is Unsupportable.

First, respondent's arguments that the giving of the proposed instruction could somehow prejudice the FELA claimant's interests are untenable. The contention that giving the instruction might cause jurors to *reduce* the award by the amount of an imagined tax (Respondent's Brief, at 30) is preposterous; what the proposed instruction says is that

income taxes should not be *considered* because the awards are not subject to income tax (A87).[28]

Second, respondent's contrary assertions notwithstanding (Respondent's Brief, at 30), petitioner's objection to the Illinois rule is not based on any assumption that jurors "automatically disregard the court's instructions." The reason the Illinois rule is so pernicious is that, unless the proposed nontaxability instruction is given, it would result in an award that substantially overcompensates the plaintiff if (1) the jury interpreted the court's charge as requiring it to include in the award any taxes that will be imposed on it, and (2) the jury were further to believe, as juries often will, that awards are taxable. That such an interpretation is highly likely is illustrated by the instruction given in this case. The directive "to fix the amount of money which will reasonably and fairly compensate the survivors for their pecuniary loss" (A83) could be construed as requiring that the jury ensure that claimants receive such amount of disposable—*i.e.*, "after-tax"—income as will fully compensate them. The proposed instruction is needed to avoid the possibility that the jury, because of ambiguity in the instruction and jury misinformation as to whether the award is taxable, would grossly overcompensate the plaintiff in violation of applicable law. It is for these reasons that every court of appeals that has considered the matter has rejected the Illinois

[28]Similarly, respondent's claim that the proposed instruction is not a correct statement of the law because it does not state that interest earned on the award is taxable and that it thus could lead a jury to reduce the award by the "tax savings" on interest (Respondent's Brief, at 30–31)—in addition to being wholly unrealistic—also ignores that all the instruction says is that no amount should be *added* to the *award* by reason of taxes payable on *it*. Of course, if a FELA plaintiff were genuinely concerned that the proposed instruction could prejudice him—which he should not be—he could seek an instruction concerning the taxability of the interest.

position that the nontaxability instruction is prohibited, and a number of courts have required that it be given in all cases. *See* Petitioner's Brief at 35 n.28 & 36.

B. The Refusal To Give The Nontaxability Instruction Here Constituted Reversible Error.

Respondent offers no substantial response to petitioner's claim that the failure to give the instruction here represented reversible error. Her brief does not seriously dispute that, in our tax-conscious world, juries are likely to assume that damages awards—like nearly every other receipt of cash—is taxable to the recipient. Respondent's sole argument to the contrary is the fact that I.R.S. Publication 17, Your Federal Income Tax, 1979 Edition, states at the bottom of the third column of page 71[29] (of a 192-page volume) that damages received for injury or sickness are exempt from tax. (Respondent's Brief, at 11) This claim of respondent's is no more an answer to petitioner's submission than would be an argument that all jurors are aware of the exemption because it appears in the Internal Revenue Code.

Nor does respondent deny that the most likely explanation for the fact that the jury here awarded respondent $775,000—when her own expert testified the pecuniary loss was $302,000—is that the jury assumed that the award would be taxed and interpreted the court's instruction as requiring it to inflate the award by the amount of an imagined tax.

Respondent argues, in the alternative to her main argument (Respondent's Brief, at 34–35), that the nontaxability instruction should be required prospectively only. While this is the *least* that should be required—the benefits of this instruction being so clear and the burdens so minimal—there was in the present case every basis for believing that

[29]Respondent's statement that this appears on p. 11 is in error.

the failure to give the instruction misled the jury into doubling the amount of the award. Accordingly, the case at bar is far clearer than *Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 72 (1913), where a similar ambiguity in the instructions was held to require reversal of the judgment.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's Brief, the judgment of the Illinois Appellate Court, First District, First Division, should be reversed.

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October, 1979

APPENDIX

26 U.S.C. §104(a), Int. Rev. Code of 1954, §104(a).

(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include--

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness;

(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer); and

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22 U.S.C. 1081; 60 Stat. 1021).

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c) (1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee.

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JUN 29 1979

No. 78-1323

In the
Supreme Court of the United States
OCTOBER TERM, 1978

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE of NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Railroad Trial Counsel hereby respectfully moves this Court for leave to file its brief as *amicus curiae* in the instant case. The consent of the attorney for the respondent and petitioner was requested. Both the respondent and the petitioner refused consent.

The questions presented herein regarding uniform application of the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.* concerning the evidentiary impact of income taxes and their effect on damage awards are of vital concern to the National Association of Railroad Trial Counsel and to all of the nation's railroads. The railroads represented by the National Association of Railroad Trial Counsel are continuously confronted with death claims and lawsuits. The inability of uninformed juries to take into account the non-taxability of damage awards will result in punitive awards and excessive compensatory awards to plaintiffs, as demonstrated in the instant case, and will continue to have a disastrous effect on the already threatened public railway system. Some railroads have been subsidized by the public, the most notable subsidy being Conrail. Moreover, the increasing curtailment of railway service indicates that the socio-economic effect of this Court's decision will impact on the national railway system. Preservation of the public railway transportation system is critical to this nation's attempt to conserve energy.

Ultimately, the public bears the effect of the additional costs created by the excessive verdict of juries uninformed of the non-taxability of damage awards. In particular herein, the public is threatened with harm to the national railway system.

In the instant case, petitioner Norfolk and Western Railway Company received an excessive adverse verdict, resulting from the trial court's failure to admit evidence and to instruct the jury on the Internal Revenue Service rules on taxation of damage awards. In addition, in the lower courts, the respondent contended that the questions presented should be determined on a state-by-state basis. The National Association of Railroad Trial Counsel respectfully submits that its brief as *amicus curiae* fully emphasizes the national importance of the issues presented and the necessity of applying federal law to the issues herein. The National Association of Railroad Trial Counsel further submits that this Court's adoption of its position as set forth in its brief as *amicus curiae* will benefit the public nationwide by disposing of the issues herein as to every state in the union.

Wherefore, the National Association of Railroad Trial Counsel prays that this Court grant this motion to file its brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

ARGUMENT

FEDERAL LAW REQUIRES THAT THE EFFECT OF INCOME TAX BE CONSIDERED IN AWARDING FELA DAMAGES.

A. Interest of the Amicus Curiae.

The questions presented herein regarding uniform application of the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.* concerning the evidentiary impact of income taxes and their effect on damage awards are of vital concern to the National Association of Railroad Trial Counsel and to all of the nation's railroads. The railroads represented by the National Association of Railroad Trial Counsel are continuously confronted with death claims and lawsuits. The inability of uninformed juries to take into account the non-taxability of damage awards will result in punitive awards and excessive compensatory awards to plaintiffs, as demonstrated in the instant case, and will continue to have a disastrous effect on the already threatened public railway system. Some railroads have been subsidized by the public, the most notable subsidy being Conrail. Moreover, the increasing curtailment of railway service indicates that the socio-economic effect of this Court's decision will impact on the national railway system. Preservation of the public railway transportation system is critical to this nation's attempt to conserve energy.

Ultimately, the public bears the effect of the additional costs created by the excessive verdicts of juries uninformed of the non-taxability of damage awards. In particular herein, the public is threatened with harm to the national railway system.

In light of the importance of these issues to the nation's railroads, it is therefore appropriate that this Court consider the views of the National Association of Railroad Trial Counsel as set forth in this brief *amicus curiae.*

B. This Matter Is Governed By Federal Rather Than State Law Because The Impairment Of A Substantive Federal Right Is At Issue.

A properly measured damage award is among the substantive rights created by the Federal Employers Liability Act. (FELA), 45 U.S.C. §51 *et seq.* As this Court held in *Chesapeake & O. R. Co.* v. *Kelly,* 241 U.S. 485 (1916):

> "[T]he proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal employers liability act it must be settled according to general principles of law as administered in the Federal courts." 241 U.S. 485, 491.

Chesapeake & O.R. Co. v. *Kelly,* 241 U.S. 485, followed earlier cases in defining FELA damages for wrongful death as the amount surviving beneficiaries would have received had decedent lived. It further held that such damages were to be strictly measured, requiring the reduction of damage awards to present value.

The assertion of substantive federal rights cannot be defeated by mere rules of local practice and procedure. Whether a particular state procedure improperly impairs the assertion of a federal right is a federal question, requiring the application of federal law for its resolution. Amicus curiae National Association of Railroad Trial

Counsel respectfully submits that petitioner's substantive federal right to a properly measured FELA damage award was improperly defeated by the refusal of the Circuit Court of Cook County, Illinois (1) to admit evidence and to instruct the jury on the effect of income taxation on decedent's probable future income, and (2) to instruct the jury that its award of damages was not taxable.

In the lower courts respondent has contested the applicability of federal law to these questions. Although conceding petitioner's position that the measure of FELA damages is governed by federal law, respondent Liepelt has attempted to distinguish the admission of evidence and the issuance of jury instructions as strictly procedural matters, governed entirely by state law.

Respondent's argument overlooks an important principle of federalism. State procedure cannot be permitted to disregard federal rights. The general operation of state procedure is qualified by the principle that the assertion of federal rights cannot be defeated by local procedure.

Both legislative history and considerations of public policy require uniform enforcement of rights under the FELA. The central purpose of a federal statute governing the railroads' responsibilities to employees was to "create uniformity throughout the Union." H.R. Rep. No. 1386, 80th Cong., 1st Sess. 3 (1908). Uniformity is especially critical today because of the precarious financial condition of the public railway system and its increasing importance to an energy-conscious nation. Local departures from the federal rule limiting FELA compensatory damage awards, result in inflated jury verdicts, punitive in nature, which burden the public railway transportation system.

This Court has repeatedly intervened to prevent the operation of state procedural rules that impaired substantive rights under the FELA. In *Brown* v. *Western Railway of Alabama,* 338 U.S. 294 (1949), this Court reversed the dismissal of an FELA complaint by the Appellate Court of Georgia. Georgia practice required pleadings to be construed most strongly against the pleader, and the Appellate Court of Georgia found the complaint insufficient to state a cause of action. This Court reversed, holding that a federal right cannot be defeated by the forms of local practice and finding the complaint to state a cause of action under the FELA. The opinion stated, "Should this court fail to protect federally created rights from . . . over-exacting local requirements . . . desirable uniformity in adjudication of federally created rights could not be achieved." 338 U.S. 294, 299.

Local procedure was superseded by the requirements of the FELA in *Dice* v. *Akron, C. & Y. R. Co.,* 342 U.S. 359 (1952). An FELA plaintiff in Ohio had alleged that a release relied upon by defendant was obtained through misrepresentation and fraud. Ohio procedure provided for a jury trial on factual questions relating to negligence, but divided the fraud issue into parts, only one of which was tried to a jury verdict. This Court reversed and remanded the Ohio Supreme Court's judgment for defendant. This Court found that the right to a jury trial, afforded by the FELA, could not be qualified by the local procedural rules of Ohio.

In *Arnold* v. *Panhandle & S.F. R. Co.,* 353 U.S. 360 (1957), a Texas rule of practice was held inapplicable to FELA actions. The jury found that the employer had contributed to plaintiff's injury, but found for the em-

ployer on special issues regarding plaintiff's negligence. Texas practice required that a general verdict must yield to inconsistent findings on special issues, and the Appellate Court of Texas reversed a judgment for plaintiff. This Court found that the Texas Appellate Court's reversal was improper because the local procedural rule operated to defeat rights created by federal statute.

Evidentiary matters are also subject to federal scrutiny, as illustrated by *Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15 (1959). A jury verdict for an Ohio FELA plaintiff was reversed on evidentiary grounds by the Ohio Supreme Court. On review, however, this Court, in finding that the proofs justified the jury's original conclusions, referred to a federal standard for sufficiency of evidence.

Thus, the substantive federal rights created by the FELA limit the operation of state procedure. Since a properly measured damage award is a substantive federal right, the evidentiary and procedural context for its assertion is not merely a matter of state law. Federal law requires that state courts permit the effective assertion of the right to a properly measured damage award. Refusal of state courts to recognize that federal substantive rights control is reversible error.

In the instant case, the trial court refused to admit evidence or to instruct the jury on the impact of income taxation on decedent's future earnings, or to instruct the jury that its award was non-taxable. *Amicus curiae* contends that those tax considerations must be considered in measuring FELA damages. Therefore, the question is not whether the trial court's refusals were permissible under Illinois procedure, but whether those refusals impermissibly prevented the assertion of a federal right.

The right to assert the FELA measure of damages is a federal question, requiring the application of federal law when violated. Respondent's characterization of the issue as procedural and governed by state law is manifestly incorrect.

C. The Railroads Will Be Severely Prejudiced If Compensatory Damages Under The Federal Employers' Liability Act (FELA) Are Determined Without National Uniformity.

The United States Congress specifically recognized the national character of the railroad industry in House Report No. 91-1194, U.S. Cong. & Ad. News 4104, 4110 (1970):

> "With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulations and enforcement. It is a national system."

Adoption of the FELA by Congress is a further example of the interstate national character of the industry, which has required the application of federal law to achieve a national goal. In an FELA case, that goal is the protection of the employees of the railroad to insure that they obtain just compensation for their injuries. Congress adopted the FELA to avoid the variation in protection that employees were accorded on a state-by-state basis.

The national scope of the FELA is undermined to the extent that state courts vary the standard of just compensation established by the Act. In failing to consider the impact of taxation in setting wrongful death damages, some states bestow a windfall upon plaintiffs, in addition to compensatory damages, and add a punitive

dimension to an award. This departure from the requirements of federal law severely prejudices the railroads.

These considerations suggest the wisdom of Congress in adopting the FELA as a uniform national system of compensation. Reasons of public policy, as well as legislative intent and fairness to litigants, compel this Court to establish a national rule that taxation be considered in computing FELA damages.

D. Federal Law Requires That The Effect Of Taxation Be Considered In Computing Wrongful Death Damages Under The FELA.

The FELA provides for compensatory damages in personal injury and wrongful death actions. It does not provide for punitive damages. Compensatory damages "place the injured person as nearly as possible in the position he would have occupied had the wrong not occurred." McCormick, Law of Damages, 560 (1935). This Court has defined the measure of damages in an FELA wrongful death action as the amount the decedent's beneficiaries could reasonably have expected to have applied to their benefit if the decedent had lived. *Norfolk & W. R. Co.* v. *Holbrook,* 235 U.S. 625, 629 (1915); *Michigan Central R.R. Co.* v. *Vreeland,* 227 U.S. 59, 72-73 (1913). In limiting damages to the amount beneficiaries would have received, this Court has required that awards for lost prospective financial benefits be reduced to present value. *Chesapeake & O. R. Co.* v. *Kelly,* 241 U.S. 485 (1916). Likewise, a reduction must be made for that part of decedent's income he would have applied to his own benefit. *Kansas City Southern R. Co.* v. *Leslie,* 238 U.S. 599 (1915). The FELA is designed to make plaintiff whole, not to bestow a windfall upon him.

Taxation inescapably reduces the percentage of gross income any wage earner can apply to the benefit of his dependents while he lives. A decedent's beneficiaries cannot reasonably expect that monies taken by taxation would have been applied to their benefit had he lived, since only a decedent's after-tax net income could have been applied to their benefit had he lived. To the extent that a damage award for wrongful death includes monies that could not have been applied to plaintiff's benefit during decedent's life, plaintiff has not been made whole but has received a windfall. To the same extent, a defendant, whose duty extends only to make a plaintiff whole, has been penalized. Such a damage award is not merely compensatory but punitive.

Recognizing the compensatory nature of damages and the impact of taxation on disposable income, the majority of federal jurisdictions favor consideration of income tax in computing FELA wrongful death damages. The majority position was first articulated in *McWeeney* v. *New York, N.H. & H. R.R. Co.,* 282 F.2d 34 (2d Cir. 1960). While finding the tax impact in the case before it to be minimal, *McWeeney* recognized "cases where failure to make some adjustment for the portion of a plaintiff's or decedent's earnings that would have been taken by income taxes would produce an improper result." 282 F.2d 34, 38.

Other Courts of Appeals have adopted and applied the flexible *McWeeney* test. The Seventh Circuit has ruled that evidence of income taxes must be introduced upon proper presentation where significant differences would exist between a decedent's gross and net income. Considering the loss of pecuniary benefit where the decedent anticipated earnings between $15,655 and $20,000 for 20 years commencing in 1979, the Seventh Circuit ruled

in *Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967):

> "This is a case where the impact of income tax has a significant and substantial effect in the computation of probable future contributions and may not be ignored." 379 F.2d 893, 896.

Similarly, a $335,000 FELA award was set aside in *Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284 (9th Cir. 1975), for refusal to admit evidence on income taxes. The *Boxberger* court held:

> "[W]e believe it altogether right and proper that in cases wherein the annual gross income is such that future taxes would have a substantial effect, evidence of the decedent's past and future tax liability should be admitted if a reasonably fair and accurate estimate of his lost future income is to be assured." 529 F.2d 284, 291.

The *McWeeney* rule has also been recognized in *Petition of M/V Elaine Jones*, 480 F.2d 11 (5th Cir. 1973); *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970); and *Sanchez* v. *Denver & Rio Grande Western R. Co.*, 538 F.2d 304 (10th Cir. 1976).

In the instant case, income tax would have had a significant effect on decedent Delroy Liepelt's income and contributions to his dependents. *Cox* v. *Northwest Airlines Inc.*, 379 F.2d 893, concerned earnings between $15,655 and $20,000 over a 20-year working life beginning in 1979. Decedent Liepelt fell easily in that income range, earning $13,000 in 1973, and expecting to earn over $16,000 by 1977 with 5% annual increases over his projected 24-year working life. (A48, A52-A53). Plaintiff's expert witness calculated pecuniary loss to be $302,000. (A53-A54). Defendant's offer of proof indicated the figure, after subtraction of taxes, to be $115,325. (A75). The difference of $187,000 represents a significant tax impact. The failure to consider the impact of taxation resulted in substantial prejudice to the defendant.

McWeeney v. *New York, N.H. & H. R.R. Co.*, 282 F.2d 34, discussed the principal objections raised to the consideration of income tax in measuring damages. The principal objections are (1) that the amount of future taxation is purely speculative, (2) that the computation of future tax liability is too complex and confusing for juries, and (3) that the refusal to compute taxes and the consequent advantage to plaintiff is offset by the refusal to instruct on other matters, notably inflation and attorneys' fees, which operate against plaintiff. None of these objections can be supported in logic or fairness.

First, the amount of future taxation is not purely speculative. As the Court of Appeals found in *Southern Pac. Co.* v. *Guthrie*, 180 F.2d 295, 302 (9th Cir. 1949), "[the decedent] would have found taxes fully as certain as his prospect of continued earnings." The actual impact of future taxation is no more speculative than other variables considered in determining damages. The Ninth Circuit held as follows:

> "While not subject to precise mathematical exactitude, such a projection does not appear to be too uncertain, conjectural or speculative for the jury to consider. Certainly such considerations are no more speculative than the possibility of death from natural causes, disabling, non-compensable injuries from other causes, or the future instability of familial relationships." *Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284, 292-93 (9th Cir. 1975).

The Seventh Circuit equated the uncertainty of taxation with that of life expectancy and future earnings, necessary elements of wrongful death damages. *Cox* v. *North-*

west Airlines, Inc., 379 F.2d 893. Two distinguished commentators have written as follows:

> "As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as 'death and taxes,' the courts are avoiding their responsibilities when they decline to make the best guess they can, once all the reasonably available evidence is brought before them." Harper & James, Law of Torts, § 25.12 (1936).

American juries routinely make judgments on matters as speculative as future tax liability. In logic and fairness, information on that issue should be available to them.

Second, the computation of future tax liability is neither too complex nor too confusing for juries to undertake. The Court of Appeals in *Boxberger* stated as follows:

> "[T]oday's sophisticated jurors surely have had some personal experience in determining their own tax liability, and in today's tax-conscious society we are confident that our juries and judges, with the aid of such competent expert testimony as may be received, are equal to the task and the responsibility." 529 F.2d 284, 293.

Subsequent to *Chesapeake & O. R. Co.* v. *Kelly*, 241 U.S. 485 (1916), this Court has required the reduction of damage awards to present value, a computation of equal complexity, which is far more alien to lay jurors. Indeed, those courts finding the difficulties of computation insuperable have been able to summarize the principal difficulties in a paragraph or two. Suitable jury instructions need not be greatly more complex.

Furthermore, in light of the current pervasive public concern over taxes, jurors are likely to assume that income taxes apply to any verdict they award. Uninstructed juries have requested guidance on the effect of taxation on their own motions. *Kennett* v. *Delta Air Lines, Inc.*, 560 F.2d 456 (1st Cir. 1977). To what extent such calculations are made informally, without an evidentiary base or instruction from the court, is unknown. Since juries in all likelihood do consider taxes, they should be instructed as to the non-taxability of damages.

Finally, it cannot be concluded that a failure to consider future taxation is offset by the failure to consider inflation and attorneys' fees for the following reasons: First, such an informal and amorphous system of balancing is inaccurate. Second, the jury herein considered inflation, since plaintiff introduced evidence projecting a 5% annual increase in decedent's earnings, partly as allowance for inflation. (A48) Third, attorneys' fees are not properly an element in computing compensatory damages and cannot properly be regarded as an offset in computing such damages. As the Court of Appeals held in *Burlington Northern, Inc.* v. *Boxberger*:

> "Attorneys' fees are related to private contracts between the litigants and the attorneys. They have no legitimate relevancy to the issue as to what amount of money is justly compensatory for the loss resulting from defendant's tortious act." 529 F.2d 284, 294.

Inflation and attorneys' fees do not and should not operate to offset the windfall conferred on plaintiff by the failure to consider income taxation. It is unrealistic to suggest redressing that imbalance through lack of instruction to the jury rather than through specific guidance for the jury.

In summary, none of the objections to considering income taxation have a basis in logic or fairness. Prospec-

tive tax liability is no more speculative or complex than other determinations that juries routinely make in assessing wrongful death damages. This Court has held the measure of damages for wrongful death under the FELA to be the amount the beneficiaries would have had applied to their benefit if the decedent had lived. Accordingly, most federal jurisdictions consider taxation in computing damages when, as here, it significantly affects what the beneficiaries would have received. Failure to consider a significant tax impact created an unexpected gain for plaintiff, contemplated by neither the statute nor this Court's decisions, and a corresponding penalty for defendant. Therefore, this Court should affirm the majority federal rule and reverse and remand the instant case.

E. The Court Should Have Instructed The Jury That An Award Of Damages Was Not Subject To Income Taxation.

The failure of the trial court to instruct the jurors that the damage award is not taxable created the likelihood that the jurors would assume that such an award was subject to taxation. Such an error would have led the jury to overcompensate the plaintiff by increasing the award to offset taxes. The refusal of the trial court to give defendant's Instruction 19 was therefore error.

In *Burlington Northern, Inc.* v. *Boxberger,* 529 F.2d 284 (9th Cir. 1975), the Ninth Circuit considered at length the issue of the prejudicial effect of the failure to give such an instruction. The Court of Appeals concluded that such an instruction would prevent misconceptions by the jury and would clarify the issue of the tax consequences of the award.

> "To put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable." 529 F.2d 284, 297.

No federal Court of Appeals has held that it is error to give an instruction that damage awards are non-taxable. The Third Circuit in *Domeracki* v. *Humble Oil & Refining Co.,* 443 F.2d 1245 (3d Cir. 1971), and the Ninth Circuit in *Boxberger,* 529 F.2d 284, required that such an instruction be given. At least three other circuits have held the instruction to be within the discretion of the trial court. *McWeeney* v. *New York, N.H. & H. R.R. Co.,* 282 F.2d 34 (2d Cir. 1960); *Bach* v. *Penn Central Transportation Co.,* 502 F.2d 1117 (6th Cir. 1974); *Nichols* v. *Marshall,* 486 F.2d 791 (10th Cir. 1973).

The Seventh Circuit in *Cox* v. *Northwest Airlines, Inc.,* 379 F.2d 893 (7th Cir. 1967), a non-jury case, required deduction for income taxes from damage awards in death cases where the deductions would be significant. A jury instruction on the issue of income taxation on damage awards would therefore be required in the instant case to achieve such a result. The reasoning on the jury instruction issue set forth in *Boxberger* is therefore applicable to the instant case. Since a significant impact on the damage award did result herein, an instruction that a damage award is not subject to income taxation should have been given as submitted by defendant.

CONCLUSION

Wherefore, the *amicus curiae* respectfully submits that this Court should reverse the decision of the Illinois Appellate Court and that the case should be remanded for a new trial.

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I

The Trial of Tort Actions Created by Federal Law Should Not Be Complicated by Permitting the Introduction of the Highly Speculative Evidence of the Supposed Future Tax Impact on Monies the Victim Would Have Earned Had He Been Able to Continue Working. Such a Procedure Represents a Grave Danger of Wreaking Serious Injustice and Hardship on the Victims of Federally Created Torts 6

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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1323

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division.

Motion for Leave to File Amicus Curiae Brief.

The undersigned State Trial Lawyers Associations hereby respectfully move this Court for leave to file the attached Amicus Curiae Brief in the instant case. The petitioner has refused to consent to same.

Movants are associations of trial lawyers in the respective states indicated below, and their members are regularly engaged in the trial of tort actions on behalf of tort victims. Movants thus have a vital interest in matters affecting the rights of such victims. Said rights will suffer serious adverse effects if the position of petitioner is adopted by this Court, for the reasons indicated in the attached Amicus Curiae Brief.

Movants' annexed Brief is addressed to the two questions of law at issue herein: (1) whether the loss of earning capacity shall be measured by the gross income of the injured or deceased party, or whether it shall be measured by the supposed net income, arrived at by means of deducting the supposed amount of income taxes that such party would allegedly have been required to pay on his future earnings and (2) whether a jury should be instructed that any award to the plaintiffs in a tort action will not be subject to income tax. We have reviewed the parties' Briefs and do not believe they have adequately presented those facets of these two issues which are discussed in the attached Brief.

If this motion is granted, the attached Brief is respectfully submitted.

Respectfully submitted,

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Amicus Curiae Brief of Alabama Trial Lawyers Association, Et Al.

Introductory Statement.

The basic issue presented in the case at bar has arisen by reason of a maladjustment in our income tax laws. This maladjustment has been created by inflation, which has placed low and moderate incomes within the ambit of our progressive income tax system, although it is manifest that the incomes reached by progressive taxation were far greater in terms of real income at the time the taxation formulae were adopted than they are now, or will be in the future.

The great probability is that this maladjustment will be corrected at some future time. However, in the interim the effect of the rule proposed by petitioner herein will be to permanently impose this maladjustment on claimants in FELA and Jones Act cases, by subjecting them to a reduction of their damages for loss of earning capacity based on the current rates of taxation. (Indeed, perhaps the ultimate irony in this case is that the issue presented herein does not arise in connection with a well-to-do person with an earning capacity that insures him a comfortable excess over his minimum living expenses, but rather arises in connection with an ordinary railroad worker whose income was barely sufficient, considering his family circumstances and obligations.)

It is by reason of considerations such as the foregoing, among many others of similar cogency, that the great majority of state courts that have ruled on the question have refused to permit future loss of earning capacity to be measured on the basis of the

supposed net after taxes (see Point I, *infra*). The rule urged by petitioner herein would thus make the trial of tort actions under federal law appreciably different from the trial of tort actions under the laws of the states. Said rule would also make the trial of tort actions under federal law much more difficult than the trial of tort actions under the majority rule governing state tort actions. It would markedly increase the expenses of trying tort cases governed by federal law. It would also result in victims of torts governed by federal law receiving unequal and discriminatory treatment vis-a-vis victims of torts governed by state law. Such unequal and discriminatory treatment is herein proposed to apply under the FELA and the Jones Act, statutes which have always been held to demonstrate Congressional solicitude for the rights of the injured victims covered thereunder.

We respectfully submit that this Court should not depart from the majority state practice, to the detriment of injured persons whose right of action has been created by Congress, for the reasons we shall now discuss.

ARGUMENT.

I

The Trial of Tort Actions Created by Federal Law Should Not Be Complicated by Permitting the Introduction of the Highly Speculative Evidence of the Supposed Future Tax Impact on Monies the Victim Would Have Earned Had He Been Able to Continue Working. Such a Procedure Represents a Grave Danger of Wreaking Serious Injustice and Hardship on the Victims of Federally-Created Torts.

In the case at bar, there is before this Court the situation of the wrongful death of an ordinary worker, who was employed as a fireman on a freight train at the time of the ill-fated occurrence which gave rise to this lawsuit. He was earning $13,000.00 per year, and had a wife and four children. While the amount of decedent's earnings constituted a considerable sum at the time the applicable income tax percentages were originally enacted, by 1973, the year of his death, inflation had made such earnings commonplace, and decedent was at the low end of the economic scale. Thus, the issue of income tax impact has been placed before this Court in a case involving a person who was not in the financial circumstances envisioned by Congress when the sharply progressive tax rates applicable herein were enacted. See, generally, "Inflation and The Income Tax," (1977) Brookings Institution Analysis, pp. 157-161.

These circumstances constitute the crux of our concern with respect to the issues before this Court. Due to the raging inflation that has plagued us over the past decades, tax rates intended to apply to those

in comfortable circumstances under the system of progressive income taxation are now being imposed on persons whose earnings are barely sufficient for subsistence. (See "Inflation and The Income Tax," op. cit. at pp. 154-157). However, this problem is being recognized and given attention, and numerous proposals are under consideration to "index" tax rates so that they will take account of the fact that inflation has completely distorted the system of progressive taxation. There can be little question but that appreciable relief will be given in this respect in the years to come, although, of course, exactly when and how this relief will be effected cannot be predicted. See, generally, "Inflation and The Income Tax," op. cit., ch. 5, pp. 153, *et seq.*

The result will be that to take into consideration the tax impact based on present tax rates will seriously undercompensate the injured person or his survivors, because such tax rates may become obsolete at any time. This factor was succinctly spelled out by the Oregon Supreme Court in *Geris v. Burlington Northern, Inc.*, 561 P.2d 174 (1977), where the Court said:

> "The computations involved and the various assumptions to be considered are extremely complex. Present progressive tax rates may be projected into the future, but they cannot realistically be applied to future wages which have been projected to rise as a result of inflation without an offsetting computation for the periodic adjustment of exemptions, deductions and income tax brackets *which has historically occurred in response to inflationary trends.*" 561 P.2d at p. 178. Emphasis added.

The effect of considering future taxation is claimed to be appreciable in the case at bar. Plaintiffs' economist testified that, based upon decedent's gross wages, the present cash value of plaintiffs' pecuniary loss was $302,000.00. Under defendant's offer of proof, based on an actuary's estimate of the taxes on decedent's loss of earnings, the present cash value of the pecuniary loss was placed at between $115,325.00 and $138,327.-00. Defendant thus contends that consideration of the income tax impact *would have halved* the amount of pecuniary loss (see, for example, Petitioner's Reply Brief at pp. 4-5. See also Amicus Curiae Brief of National Association of Railroad Trial Counsel at pp. 12-13).

It cannot be seriously contended that such an enormous tax impact will be permitted to remain in the future, on the wages of an ordinary laboring man.[1] To permit personal injury recoveries to be reduced in this fashion, on the basis of the present tax structure, will thus inevitably result in serious injustice and hardship to permanently injured workmen, and to the dependents of deceased workmen.

Considerations such as the foregoing—and a host of others detailed in the other Briefs filed before this Court—have caused a clear majority of the state courts which have passed on this question to reject the proposition that awards should be reduced by the speculative amount of income taxes that the tort victim would have supposedly paid had he continued working. One

[1]Defendant's offer of proof on this subject (see Appendix, pp. 75-76) is not illuminating, but it is, presumably, based on the present tax rate structure.

It is extremely questionable that an actuary is competent to testify with respect to the future tax impact, in any event.

of the most recent cases on the subject is *Rodriguez v. McDonnell Douglas Corp.*, 151 Cal.Rptr. 399 (Cal. App. 1979). After analysis of the authorities, the Court concluded as follows:

> "It is our view that adoption of the rule which would permit the introduction of evidence of future tax consequences to affect the amount of an award in personal injury and wrongful death actions would open the door to *intense speculation* about the future on the part of the jury. The ramifications of such a rule of law could be immense. The less speculation that is involved in the jury's fact-finding process, the more likely will jury awards conform to the standard of fairness and justice between litigating parties. Furthermore, since the aim of the legal rule that would permit a jury to take future tax consequences into account in fixing the amount of an award is to determine the *net* loss to a plaintiff, a logical sequel would mandate that a jury be permitted to know the consequences to the plaintiff of the latter's obligation, customary in personal injury and wrongful death litigation, to pay attorney's fees from the award." 151 Cal.Rptr. at pp. 422-423. Emphasis in original.

Other authorities which have come to the same or similar conclusions include the following: *Seely v. McEvers*, 564 P.2d 394 (Ariz. App. 1977), construing *Mitchell v. Emblade*, 298 P.2d 1034 (Ariz. 1956); *High v. State Highway Dept.*, 307 A.2d 799, 805 (Del. 1973); *Seaboard Coast Line R. Co. v. Thomas*, 188 S.E.2d 891 (Ga. App. 1972); *Hall v. Chicago & North Western Ry. Co.*, 125 N.E.2d 77

(Ill. 1955); *Highshew v. Kushto,* 134 N.E.2d 555 (Ind. 1956); *Rediker v. Chicago, Rock Island and P.R. Co.,* 571 P.2d 70 (Kan. App. 1977); *Reeves v. Louisiana & Ark. Rway. Co.,* 304 So.2d 370, 377 (La. App. 1974); *Lumber Terminals, Inc. v. Nowakowski,* 373 A.2d 282 (Md. App. 1977); *Dempsey v. Thompson,* 251 S.W.2d 42, 45 (Md. 1952); *McGee v. Burlington Northern Inc.,* 571 P.2d 784, 790-791 (Mont. 1977); *Missouri-Kansas-Texas R. Co. v. Miller,* 486 P.2d 630, 636 (Okla. 1971); *Girard Trust Corn Exchange Bank v. Phila. Trans. Co.,* 190 A.2d 293, 297-298 (Pa. 1963); *Texas & N.O.R. Co. v. Pool,* 263 S.W.2d 582 (Tex. Civ. App. 1953); *Hoge v. Anderson,* 106 S.E.2d 121 (Va. 1958); *Hinzman v. Palmanteer,* 501 P.2d 1228 (Wash. 1972).

In *Geris v. Burlington Northern, Inc., supra,* 561 P.2d 174 (1977) the Oregon Supreme Court reviewed the authorities and concluded that at least 29 state courts have considered the question and the "vast majority" hold that evidence of the impact of taxation on plaintiff's damages is not admissible (561 P.2d at p. 177, fn. 4). The Court found that only three state courts (Connecticut, New Jersey and Iowa) have held that such evidence should be considered (*ibid.*). Thus, the rule proposed by petitioner herein would result in a rule in tort actions brought under federal law different from the rule employed by the states, and would obviously afford unequal and discriminatory treatment to plaintiffs in tort actions brought under federal law.

Apart from the factors already mentioned, we view as most grave the effect of the rule proposed by petitioner on the costs of litigation and the trial time

that would be expended in applying such proposed rule. It cannot be applied by merely bringing in the cursory testimony of an actuary, as petitioner's rather insufficient offer of proof seems to suggest (see footnote 1, *supra*). Rather, every trial involving a death or a permanent disability will require the testimony of tax experts to analyze the projections under the circumstances of a particular case. These experts are not inexpensive. They will be involved in all manner of prognostication regarding future tax laws, the impact of changes in circumstances on the supposed future taxes, and many other complex matters involving tax laws. This question alone will engraft an entirely new facet into the trial of personal injury cases, at a considerable expenditure of time and money to the injured plaintiff, as well as the defendants. The increase in trial time for testimony on both sides of this issue is incalculable, but will obviously represent an increased burden on the judicial system. State trial courts—which adjudicate an appreciable percentage of FELA and Jones Act cases—will be required to follow a procedure with respect to assessment of damages which is at a marked variance with the procedure they follow in other tort cases.

Nor do the alleged considerations of fairness so strenuously urged by petitioner dictate that this Court require the foregoing complexities to be engrafted onto all FELA and Jones Act trials involving death or permanent disability. The plaintiffs in such cases will not easily escape taxation, in any event. Save for investments in bonds issued by governmental entities (which are often risky ventures not suitable for the unsophisticated, and which offer low yields by reason of the

favorable tax consequences), we know of no method by which the returns from investment of the proceeds of the tort judgment can escape taxation. Thus, the government will get such share of the judgment as Congress elects to assess at the time the proceeds of the investment are paid. To adopt the rule urged by petitioner would thus impose double taxation on the tort victim. His recovery would be reduced once by a reduction of future loss of earnings to allow for taxation, and it would be reduced again when the income from the invested proceeds of the judgment are taxed. See *Geris v. Burlington Northern, Inc., supra,* 561 P.2d at p. 179; *High v. State Highway Dept., supra,* 307 A.2d at p. 805.

To subject the average railroad worker or seaman to such double taxation is manifestly unfair and unjust.

The genesis of the rule that after-tax income should be the measure of damages is the English case of *British Transport Commission v. Gourley,* 3 All E. R. 796 (1955). Therein, under England's severe tax structure, taxation would have reduced plaintiff's loss of earnings from 37,720 pounds to 6,695 pounds, a reduction of more than 80%. The Court held that the after-tax loss governed.

However, in England the successful plaintiff's attorney's fees are assessed against the defendant. See Stoebuck, "Counsel Fees," 38 U. of Colo. L. Rev. 202, 204 (1966); *Quint,* "Attorney's Fees—An Item of Damages," 41 L.A. Bar Bulletin 367 (1966) and authorities cited at p. 367, fn. 1. Under these circumstances, the hardships on the injured plaintiff are not nearly as serious, and the harsh impact of petitioner's proposed rule is somewhat alleviated. Thus, in *Helfend*

v. SCRTD, 84 Cal.Rptr. 173, 465 P.2d 61 (Cal. 1970), the California Supreme Court reaffirmed the validity of the collateral source rule. One of the rationales for this result was that the collateral source rule "partially serves to compensate for the attorney's share and does not actually render 'double recovery' for the plaintiff" (84 Cal.Rptr. at p. 180.) The Court noted that many of those jurisdictions which had abolished the collateral source rule provided that plaintiff is compensated for his attorney's fees (*ibid.*). The Supreme Court stated that in the absence of a rule providing for such compensation, the collateral source rule was desirable, because it "partially provides a somewhat closer approximation to full compensation for [the plaintiff's] injuries" (84 Cal.Rptr. at p. 181).

The same considerations apply to the issues now before this Court. In *Petn. of Marina Mercante Nicaraguese, S.A.,* 364 F.2d 118 (2d Cir. 1966), cert. den., 385 U.S. 1005, 87 S.Ct. 710, 386 U.S. 929, 87 S.Ct. 851, the Court of Appeals reversed a judgment in which the Trial Court deducted future income taxes from a decedent's estimated annual earnings (which ranged between $9,300 and $11,500, amounts at least equivalent in "real" earnings to the earnings of decedent at bar, a decade later). The Court of Appeals said:

> "in 'the great mass of litigation at the lower or middle reach of income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and * * * *the plaintiff is almost certain to be undercompensated for loss of earning power in any event.' The under compensation would arise from the erosion of the recovery due to the failure to award*

attorneys' fees, almost always high in this type of litigation because of their contingent nature, and continuing inflation." 364 F.2d at p. 125. Emphasis added.

It should also be observed that the present majority rule has been considered by some commentators as akin to the collateral source rule. See, *e.g., Lumber Terminals, Inc. v. Nowakowski, supra,* 373 A.2d 282, 291, fn. 9; *Reeves v. Louisiana and Arkansas R. Co., supra,* 304 So.2d 370, 377; Annotation, 63 A.L.R. 2d 1393, 1401; Note, 77 Harv. L. Rev. 741, 747 (1964); Note, 69 Harv. L. Rev. 1495, 1496 (1956). The vitality of the collateral source rule in FELA and Jones Act cases cannot be doubted. *Eichel v. New York Central,* 375 U.S. 253, 84 S.Ct. 316 (1963); *Tipton v. Socony Mobil Oil Co.,* 375 U.S. 34, 84 S.Ct. 1 (1963).

In sum, the great and overwhelming weight of authority demonstrates that the alleged imposition of taxation should not be considered with respect to those persons protected by the FELA and the Jones Act—average workmen at the middle and lower reaches of the economic scale. The fact that the progressive system of income taxation has not, at this point in time, been adjusted to account for inflation, constitutes no reason at all to penalize FELA and Jones Act claimants who happen to be injured during this doubtless temporary period of maladjustment. To do so would be to subject such claimants to undercompensation, exacerbated by double taxation and serious increases in litigation expenses. These considerations, when coupled with the increased burdens on the court system that would result from such a rule, demonstrate, we respectfully submit, that the rule followed by the great majority

of the state courts is the far sounder rule. We therefore respectfully submit that this Court should rule accordingly.

II

The "Tax" Instruction Should Not Be Given.

Our basic objection to instructing the jury that its damage award is not subject to income taxation is that it carries with it the implication that the plaintiff will receive the award tax-free. In reality, the award is not tax-free, because the investment proceeds of the award are taxable. Moreover, the proposed instruction focuses on one very limited area where the award is not subject to depletion, but ignores the other areas where the award is substantially depleted, by attorneys' fees and other costs necessarily incurred in prosecuting a lawsuit. Thus, the instruction presents a distorted view of the actual situation.

The problem is succinctly set forth in the concurring and dissenting opinion of Chief Judge Breitel in the case of *Coleman v. New York City Transit Authority,* 332 N.E.2d 850 (New York 1975), as follows:

> "The problem is a complicated one and not simply resolved. Apart from the intricacy of the tax laws, *I do not see how or why the tax problem should be separated from those of the different varieties of insurance, including Medicare and Medicaid, and not least of all, by any means, lawyer fees and costs of investigation and experts.* I understand the temptation to treat with the problem but do not believe the time has arrived for its solution or that an acceptable solution has been presented." 332 N.E.2d at pp. 858-859. Emphasis added.

And in *Michaud v. Steckino*, 390 A.2d 524 (Me. 1978), the Court said:

> "Was this . . . requested instruction suggested *for the very purpose of having the jury consider, at least subconsciously, the free tax status of the award of damages* which they were to assess at present value for loss of earning power as reflected through the loss of future earnings which jurors know would have been taxable, if the plaintiff had not been prevented from earning the same by reason of the accident, *in the hope of obtaining a reduced award in the final analysis?*
>
> "We agree, however, that the avowed purpose of such a request is to discourage a jury from enlarging an award, because they may entertain an erroneous belief that the plaintiff will be called upon to pay income taxes thereon.
>
> "It may be conceded that there does exist a possibility of harm if the jury is left uninformed respecting the tax status of the award; on the other hand, *it is conceivable that the plaintiff could be prejudiced if they were told of the tax exemption provision. . . .*
>
> . . .
>
> "If such an instruction as suggested by the defendant were proper, *what objection could there be to a requested instruction informing the jury that the fees of the plaintiff's counsel* (ordinarily not recoverable as damages—see *Gagnon v. Turgeon*, Me., 271 A.2d 634 (1970)) *are not elements of damage*, even though plaintiff will have to pay them out of the award or that the defendant will not be paying the verdict out of his own pocket, since there is insurance coverage.

> These matters are of no concern to the court or jury. Similarly, whether the plaintiff has to pay a tax on the award or not is a matter that concerns only the plaintiff and the government." 390 A.2d at pp. 534-535. Emphasis added.

The rule that an instruction of the type now under discussion need not or may not be given is the rule in the majority of the states (see *Coleman, supra, Michaud, supra*). We respectfully submit that the foregoing considerations demonstrate the soundness of such a rule, and the potential for prejudice and misuse of the rule urged by petitioner.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

VS.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

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Annot., 63 A.L.R.2d 1393 (1959) 9, 10, 14
Annot., 79 A.L.R.2d 553 (1961) 10, 12
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Note, Taxation of Damage Recoveries From Litigation, 40 Cornell L. Q. 345, 346 (1955) 18
1 S. Speiser, Recovery for Wrongful Death, §§ 8:12-8:14 (2d ed. 1975) 10, 14
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In The

Supreme Court of the United States

October Term, 1978

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of Trial Lawyers of America, by Edward J. Kionka, Sheldon S. Cohen and Michael F. Colley, its attorneys, respectfully move for leave to file its brief as Amicus Curiae in the instant case.

The motion of The National Association of Railroad Trial Counsel for leave to file an amicus curiae brief has already been allowed, and its brief is on file. In its motion, the Railroad Trial Counsel states that respondent Liepelt refused consent. This statement is not accurate.

Attorneys for respondent Liepelt told the Railroad Trial Counsel that there would be no objection to their motion if they would similarly consent to the filing of an amicus curiae brief on behalf of The Association of Trial Lawyers of America. The Railroad Trial Counsel declined to so agree. Defendant has refused consent for the filing of this brief.

The Association of Trial Lawyers of America is a national association composed of lawyers regularly engaged in the trial and appeal of all types of contested matters, as well as sitting judges, law professors, lawyer-administrators, and other lawyers, whose membership now numbers approximately 35,000. This Association, through its appropriate officers and committees, has authorized its participation in this cause as amicus curiae.

This Association seeks to represent in this litigation the interests of all persons who have been or will be injured, and the survivors of those who have been or will be killed, as a direct and proximate result of the negligence of a railroad, whether they be railroad employees or members of the general public. The interest of the Association arises both from the national ramifications of this decision and from its desire to speak for the many individual citizens who are or will become interested in the outcome of this case.

It is the Association's position that it ill behooves a tortfeasor who has caused a workman's death to ask the courts to spend precious time and resources litigating the deceased's hypothetical future tax liability, all for the purpose of transferring to the tortfeasor the tax benefit which Congress sought to give the victim. The injection of this issue into a personal injury trial simply does not withstand any rational cost-benefit analysis.

WHEREFORE, The Association of Trial Lawyers of America prays that this Court grant its motion to file its brief Amicus Curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

SUMMARY OF ARGUMENT

The trial court correctly refused to give an instruction that plaintiff's damages are not subject to income taxation. Such an instruction would be confusing and misleading. It is not an instruction on the law applicable to the evidence, but is rather a cautionary instruction based upon the assumption that the jury will be guilty of misconduct. As such, it is and ought to be discretionary

with the trial court. Almost all jurisdictions which have considered this question have refused to require such an instruction. Moreover, this is a matter as to which state law controls, since the instruction does not go to the merits of the case or to the measure of damages, but rather is an administrative or cautionary instruction. As to such instructions, state law, not federal law, controls.

The trial court also correctly refused to permit evidence or argument concerning the extent to which the decedent's post-death earnings would have been reduced by income taxes. The lower federal courts are split, some favoring the *McWeeney* rule which allows such taxes to be taken into account only when the decedent's income was beyond the lower or middle reach of the income scale, and others refusing to allow such evidence in any case. The majority of state courts reject such evidence, as does the Restatement (Second) of Torts. To allow such evidence would nullify the tax benefit which Congress has given the recipients of personal injury damages, and would introduce into the trial of an F.E.L.A. case a complex, confusing collateral issue involving improper speculation about future facts and tax laws. And rejection of this evidence does not, in fact, result in plaintiff being overcompensated.

ARGUMENT

I.

LOWER STATE AND FEDERAL COURTS SHOULD CONTINUE TO HAVE DISCRETION TO REFUSE TO GIVE A JURY INSTRUCTION ON THE NON-TAXABILITY OF PLAINTIFF'S DAMAGES.

Defendant's contentions with respect to the income tax aspects of (1) plaintiff's damages and (2) decedent's earnings are two separate and distinct issues and must be treated as such.

Defendant and Amicus Railroad Trial Counsel contend that since the damages awarded to plaintiff (Kandythe J. Liepelt, as administrator of her deceased husband's estate on behalf of herself and her children) are not subject to federal income taxation, this fact should have been disclosed to the jury.

As defendant and the railroad amicus necessarily concede, the overwhelming majority of jurisdictions which have considered this issue have refused to mandate such an instruction. This is because there are strong policy reasons against such a requirement. Under these circumstances, defendant should have the burden of persuasion that the reasons supporting such an instruction are so compelling that this Court should require it be given as a matter of federal law. Clearly, no such necessity has been shown.

Defendant's argument presumes that the jury would probably be guilty of misconduct; that the jury would take it upon itself to add a sum to the damages properly computed in accordance with the instructions because of its erroneous assumption that Mrs. Liepelt will have to pay income tax on the amount of her judgment. We sub-

mit that there is no basis whatsoever for the assumption that the jury will disregard its oath, disregard the evidence, and disregard the court's instructions. Moreover, an instruction such as requested by defendant would be bewildering at best, and could itself lead the jury into error in its computations. The jury below heard no evidence concerning any tax consequences to Mrs. Liepelt of its award, nor would such evidence be relevant in any case. It heard no argument by counsel explaining the tax consequences of its judgment, and any such argument, even if permitted, would be collateral and confusing. The jury probably would not understand that the purpose of the instruction is to prevent its misconduct, and would be at a loss as how to take this fact into consideration. Such an instruction might even lead the jury into erroneously *reducing* the award arrived at in *proper* manner, following the letter of the substantive instructions concerning damages. Thus, the potential mischief inherent in any such instruction far outweighs any likelihood of the misconduct which it is supposed to prevent. Defendant has not shown and cannot show any basis in reality which would justify this instruction. Its sole basis is the rather unseemly speculation concerning jury misconduct.

In addition, any such instruction would be anomalous. The function of instructions is to tell the jury the law applicable to the evidence presented. The proposed instruction does no such thing. It does not tell the jury how to arrive at their verdict, but rather paternalistically admonishes them not to engage in misconduct. Instructions of this type have no place in a jury trial. They place the trial court in the position of revealing to the jury its fear that the jury may do wrong, and cautioning against such wrongdoing. The likelihood is that either

the jurors would rightfully resent such an assumption about their behavior, or else the jurors would misunderstand the purpose of the instruction and thereby miscalculate the award.

If we are to give instructions such as the one proposed by defendant, then logically we cannot stop at the instruction proposed. Using this same rationale, we should also tell the jury not to take into account the fact that the investment income earned on the award is taxable to the widow. We should also tell the jury that attorney's fees should not be considered in making the award, since it is far more likely that the jury would consider the impact of attorney's fees than that it would consider the taxability of the award. Similarly, the jury should also be told that it should not consider the fact that the defendant is a wealthy corporation, or that it may be insured, since it is reputed that juries also take these facts into consideration. Under this rationale, the jury should also be told not to consider the fact that the payment of the award is a deductible expense by the defendant on its income tax return. Other examples of jury misconduct which might affect its award, and therefore which would be proper subjects of cautionary instructions, can be imagined. To mandate an instruction such that is suggested by the defendant would logically compel the opening of the door to a whole range of instructions designed to prevent the consideration of extraneous factors by the jury. This is undoubtedly one of the major reasons why the overwhelming majority of courts which have considered this question have refused to require that it be given. Annot., 63 A.L.R. 2d 1393, § 6 and supplements. See, e.g., *Hall v. Chicago & N.W. Ry.*, 5 Ill. 2d 135, 125 N.E.2d 77 (1955); *Michaud v. Steckino*, 390 A.2d 524, 534-36 (Me. 1978).

Defendant claims that the issue whether such an instruction should be given is one of *federal* law, and therefore this court must adopt a rule which will be binding in all F.E.L.A. cases tried in state and federal courts. This is simply not correct. Assuming for the sake of argument that the *measure of damages* in an F.E.L.A. case may be determined by federal law, the form and content of jury instructions are clearly matters of procedure as to which the law of the forum controls. *Central Vt. Ry. v. White*, 238 U.S. 507 (1915); *Kansas City So. Ry. v. Leslie*, 238 U.S. 599 (1915); Annot., 79 A.L.R. 2d 553 (1961) and supplements. The instruction in question is not substantive, but is rather a general cautionary instruction as to which each jurisdiction traditionally has been given discretion to fashion its own instructions. The cases cited for this proposition in the brief of defendant and the railroad amicus are distinguishable on this basis. Thus, as to this proposed instruction, there is no federal question or federal interest sufficient to require intervention by this Court. Traditionally, the lower state and federal courts have been given discretion to instruct the jury on non-substantive matters as they see fit. Defendant has not shown why instructions cautioning the jury against misconduct should be an exception to this rule.

As previously noted, various courts, state and Federal, have passed upon this issue. Among the many decisions on this point, almost all have held either that (1) it is error to give such instruction, or (2) the trial court has absolute discretion in the matter, and it is not error either to give or not to give such an instruction. 1 S. Speiser, Recovery For Wrongful Death § 8:14 (2d ed. 1975); Annot., 63 A.L.R. 2d 1393, § 6. Defendant and the railroad amicus apparently could find among all of these decisions only two federal courts and two state courts which have ruled

that such an instruction must be given if requested. *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284 (9th Cir. 1975); *Domeracki v. Humble Oil & Ref. Co.*, 443 F.2d 1245, 1248-52 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971); *Tenore v. NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613 (1975); *Dempsey v. Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952).

A good example of a recent case which discusses in detail and reaffirms the established rule is *Michaud v. Steckino*, 390 A.2d 524, 534-36 (Me. 1978).

Moreover, Illinois authority expressly requires that no such instruction be given. *Hall v. Chicago & N.W. Ry.*, 5 Ill. 2d 135, 125 N.E.2d 77 (1955); *Raines v. New York Central R.R.*, 51 Ill. 2d 428, 283 N.E.2d 230 (1972), *cert. denied*, 409 U.S. 983; *Saunders v. Norfolk & W. Ry.*, 54 Ill. App. 3d 307, 12 Ill. Dec. 21, 369 N.E.2d 518, 525 (1977).

We submit that defendant and the railroad amicus have failed to show either a sufficient federal interest, or a compelling federal need, for this court to intervene and strike down the well-established rule that such an instruction is not required.

II.

THE ILLINOIS COURTS PROPERLY REFUSED TO INJECT THE ISSUE OF INCOME TAXATION INTO THE COMPUTATION OF PLAINTIFF'S DAMAGES.

Defendant and the railroad amicus also argue that defendant should have been permitted to show, by direct evidence and cross-examination, the extent to which decedent's future earnings might have been reduced by income taxes which he would have paid on his earnings. In effect, they contend that the proper measure of

damages is decedent's *net* or "take-home" pay, and not his gross wages which defendant would have paid to him but for his death.

Here, too, defendant and amicus contend that federal law controls. However, this precise issue has yet to be decided by this Court. Generally, the courts have held that the admissibility of evidence is a procedural question as to which state law controls, unless the application of state procedural law would impair the federal remedy. See Annot., 79 A.L.R. 2d 553 (1961) and supplements. In the instant case, defendant argues that the rulings of the state courts below did not *impair* plaintiff's remedy, but rather *enhanced* it. Arguably, therefore, state law should be controlling on this issue. Nevertheless, for the sake of argument, we will assume that federal law governs the determination of this issue.

This particular question has engendered much debate and some division of authority, although the majority of courts have held in favor of the plaintiff.

Among the Circuit Courts of Appeals, the Second, Sixth, Seventh, Ninth and Tenth Circuits appear to follow the so-called *McWeeney* rule, discussed in the other briefs herein, which holds that the income tax effects on future earnings must *not* be taken into account unless and until the plaintiff's or deceased's earnings are beyond the "lower or middle reach of the income scale."

Second Circuit: McWeeney v. New York, N.H. & H. R.R., 282 F.2d 34, 38-39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965); *Petition of Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967).

Sixth Circuit: Petition of United States Steel Corp., 436 F.2d 1256, 1273-74 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971); *Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978).

Seventh Circuit: Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967); *Chapman v. United States*, 541 F.2d 641, 656 (7th Cir. 1976), *rev'd on other grounds on rehearing en banc*, 575 F.2d 147, *cert. denied*, ... U.S. ....., 99 S.Ct. 251 (1978).

Ninth Circuit: Burlington Northern, Inc. v. Boxberger, 529 F.2d 284 (9th Cir. 1975); *Felder v. United States*, 543 F.2d 657, 665 (9th Cir. 1976).

Tenth Circuit: Sanchez v. Denver & Rio Grande W. R.R., 538 F.2d 304 (10th Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *Deweese v. United States*, 576 F.2d 802 (10th Cir. 1978).

On the other hand, the First, Third, Fourth, Fifth and Eighth Circuits hold that damage awards are *not* to be reduced by *any* projected future income taxes.

First Circuit: Boston & Me. R.R. v. Talber, 360 F.2d 286, 291 (1st Cir. 1966); cf. *Kennett v. Delta Air Lines, Inc.*, 560 F.2d 456, 462-64 (1st Cir. 1977).

Third Circuit: Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 177-78 (3d Cir. 1977).

Fourth Circuit: Gardner v. National Bulk Carriers, Inc., 221 F. Supp. 243 (E.D. Va. 1963), *aff'd*, 333 F.2d 676 (4th Cir. 1964); *Plant v. Simmons Co.*, 321 F. Supp. 735 (D. Md. 1970); *Scruggs v. Chesapeake & Ohio Ry.*, 320 F. Supp. 1248, 1251 (W.D. Va. 1970). But *cf. Mosley v. United States*, 538 F.2d 555 (4th Cir. 1976) (No. Carolina law; non-jury case).

Fifth Circuit: Johnson v. Penrod Drilling Co., 510 F.2d 234, 236-37 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 839 (1975).

Eighth Circuit: Chicago & N.W. Ry. v. Curl, 178 F.2d 497, 502 (8th Cir. 1949); *Raycraft v. Duluth, M. & I.R. Ry.*, 472 F.2d 27, 33 (8th Cir. 1973); *Rouse v. Chicago, R.I. & P. Ry.*, 474 F.2d 1180, 1183 (8th Cir. 1973); *Duncan v. St. Louis-San Francisco Ry.*, 480 F.2d 79, 87 (8th Cir.), *cert. denied*, 414 U.S. 859 (1973).

While not all of these are F.E.L.A. cases, the federal and state courts have generally not distinguished between F.E.L.A. and non-F.E.L.A. cases on this issue and have treated them interchangeably.

Among the states, the overwhelming majority of decisions have held that personal injury and wrongful death awards for future lost earnings, including those in F.E.L.A. cases, are *not* to be reduced by any sum based upon projected future income taxes. In other words, damages are measured by the plaintiff's or decedent's gross pay, not his net or "take home" pay. See Annot., 63 A.L.R. 2d 1393 (1959) and supplements; 1 S. Speiser, Recovery For Wrongful Death §§ 8:12, 8:13 (2d ed. 1975).

For an excellent opinion analyzing the law nationally as of 1975, and discussing the rationale for the majority rule, see *Huddell v. Levin*, 395 F. Supp. 64, 84-91 (D.N.J. 1975), *vacated and remanded*, 537 F.2d 726 (3d Cir. 1976).

The majority view is adopted by the influential Restatement (Second) of Torts, § 914A(2), which provides:

> "The amount of an award or tort damages is ordinarily not diminished because of the fact that although the award is not itself taxed, all or a part of it is to compensate for the loss of future benefits which would have been subject to taxation."

See Comment *b*.

Defendant's arguments on this point can be condensed into a single premise—that the failure to deduct from the award the amounts which decedent would have paid in income taxes results in his survivors receiving a greater sum than they would have received if decedent had not been killed, but rather had continued to work and earn his salary.

Of course, we know that, in reality, this will never occur, since plaintiff must pay her attorneys' fees and the expenses of litigation out of her award. Defendant argues that this is a matter between plaintiff and her attorneys, and may not properly be considered in assessing her damages. However, this argument is inconsistent with defendant's argument that the purpose of the Federal Employers' Liability Act is compensatory. If the purpose of the Act is to compensate decedent's survivors to the fullest extent possible, then it would seem just as relevant to consider one extraneous factor affecting that compensation—plaintiff's certain liability for attorneys' fees—as another—the tax benefit conferred upon such awards by Congress. Either both are relevant or neither is. Nowhere it is written that the courts cannot take *both* these factors into account in fashioning a rule which will go as far as possible to achieve the Congressional purposes of (1) providing full compensation under the F.E.L.A. and (2) conferring the tax benefit provided in § 104(a)(2) of the Internal Revenue Code.

Nevertheless, for purposes of discussion, let us examine the superficial appeal inherent in defendant's argument, apart from the question of attorney's fees. Let us go further and assume a case in which the income tax consequences would be significant. It is not decisive merely to assert that plaintiff's damages (not considering the deduction for her attorneys' fees and ex-

penses) will produce a net income to decedent's survivors which is hypothetically higher than they would have received had he survived. If it were decisive, then the majority rule which now exists could not be justified. This factor must be balanced against other practical, administrative, and equitable considerations which most courts have found to compel the rejection of defendant's position.

The rationale for the majority rule is fully and amply discussed in the authorities cited, as well as in plaintiff's brief herein, and we will not fully explicate it here. Briefly, the reasons supporting the rule which rejects the injection of tax considerations into an F.E.L.A. case are as follows.

1. *Complexity.* To introduce this issue would necessarily involve the court and jury in the decision of complex tax issues, far more complex than projecting and discounting future earnings, already a difficult enough task. Tax computations are notoriously difficult, and become increasingly so as the income in question goes above the lower brackets. Moreover, such computations could not be limited to the federal income tax, but would have to include state and local income taxes and F.I.C.A. taxes. Defendant argues that such computations are not so difficult as to be beyond the jury's ability, at least with the help of expert testimony. This may be doubted, considering the extent to which ordinary taxpayers seek professional help in these matters. Moreover, this argument is self-defeating, since it imposes upon virtually every plaintiff the burden of expert testimony. Such a burden ought not be required for so nebulous a benefit to defendant. In addition, defendant's argument assumes that the tax issues will be uncontested. In reality, we know that this will not occur.

Plaintiff's tax expert will take the jury through one set of complex calculations and reach one result; defendant's expert will present another set of equally complex calculations and reach a different result. Of necessity, then, the jury will be put in the position of resolving a difficult tax issue—surely a task which Congress never intended, and which the courts ought not to impose. For this reason alone, the benefit for which defendant argues is simply not worth the cost.

2. *Speculation.* The calculation of future tax consequences of the decedent's future earnings would require numerous speculative assumptions about decedent's circumstances and about the structure of future tax laws. Defendant argues the certainty of future taxes. That may be true, but their *amount* and the *method* of their computation surely will be different in the future, just as these things have frequently changed in the past. Whatever the experts' assumptions about these variables, the only thing which is certain is that they will be more or less wrong. Defendant argues that the same is true of such matters as decedent's future earnings, which are already part of the basis for the computation of damages. But there are many fewer variables in this computation, and therefore less error. Moreover, the necessity of calculating future *earnings* is far greater than the benefit of the far more complex and speculative calculation of future *taxes.* The latter calculation cannot be justified by any rational cost-benefit analysis.

3. *Collateral Issues.* By reason of the foregoing, the trial can easily become sidetracked with the consumption of considerable time on the trial of a secondary issue, the estimated income taxes on decedent's future earnings. We must assume that this issue will be con-

tested. It would hardly seem a proper allocation of judicial and juror resources to require the parties to try a tax case along with an F.E.L.A. case. Neither the F.E.L.A. nor the Internal Revenue Code should be construed to encompass so absurd a result. An F.E.L.A. juror should not be required to adjudicate tax issues.

4. *Deprival of Tax Benefit.* To permit the deduction of an amount for future income taxes from the award for lost earnings would deprive plaintiff of the tax benefit given her by Congress in the Internal Revenue Code. See Comment, 30 La. L. Rev. 672, 685 (1970); *Huddell v. Levin*, 395 F. Supp. 64, 84-91 (D.N.J. 1975), *vacated and remanded*, 537 F.2d 726 (3d Cir. 1976). Just as plaintiff's attorneys' fees are a matter between her and her attorneys, and are of no concern to defendant, so are the income taxes for which decedent might have been liable a matter between the taxpayer and the governmental taxing authority, and of no legitimate concern to defendant. In other words, income tax is *res inter alios acta* so far as the tortfeasor is concerned.

5. *Tax Policy Considerations.* Since 1918, Congress has consistently exempted amounts received as damage awards, such as the one in issue here, from gross income for federal income tax purposes. Revenue Act of 1918, § 213(b)(6), Pub. L. 65-254. Little doubt exists at present that Congress has the power to make such recoveries taxable if it so desires. Obviously, Congress does not wish, and has not wished, to reduce damage payments by the amount of income taxes. As one commentator has pointed out, this provision is

> "based on public policy and not on strict tax logic. . . . This reflects the humane desire not to burden those already injured. . . ." Note, Taxation of Damage Recoveries From Litigation, 40 Cornell L. Q. 345, 346 (1955).

Defendant's position, if upheld, results in an anomalous situation. If damage payments were taxable, a portion of the damage award would be paid to the federal government to be used for the *public's* benefit. By exempting damage awards from taxation, Congress, in effect, has made a direct public subsidy of these taxes to those persons who have suffered damages. It is clear from defendant's argument that it expects a jury to reduce the amount of the award by the amount of income taxes that the damaged party would otherwise pay into the public fisc. But if the damage award is reduced, it is the *tortfeasor* who benefits, not the injured party or the general public. In the absence of a specific statutory provision, it should not be assumed that Congress intended to benefit tortfeasors by exempting damage payments from Internal Revenue taxes.

Defendant's position thus raises the question, on whom and to what extent benefits should be conferred in connection with the compensation for damages on account of personal injuries: the injured party, the tortfeasor, or the general public (by making such payments taxable). Congress has consistently chosen to confer such benefits on the injured party. It is submitted that after 61 years of consistent action, any change in this policy should be left to the Congress.

6. *Analogy To Collateral Source Rule.* If no deduction is made for future taxes, plaintiff will receive the tax benefit. If a deduction is made, that benefit will be awarded to the defendant. As between the injured party and the tortfeasor, it is far more just and fair that the injured party have this benefit than the tortfeasor, especially since plaintiff's award will already be reduced by expenses and attorneys' fees. Defendant argues that it will receive no "benefit," since it already has to pay

plaintiff's judgment and, in addition, another employee for the services which decedent would have rendered. This argument misses the mark. Congress already has conferred the tax benefit. But for that benefit, defendant would have no argument here. Thus, the question remains whether that benefit shall be given to the injured party or to the tortfeasor. Manifestly, it should go to the injured party.

We will not attempt here a comprehensive analysis of all the state court cases which support the majority rule. However, the following recent decisions are illustrative of the continuing vitality of that rule.

In *Lumber Terminals, Inc. v. Nowakowski*, 36 Md. App. 82, 373 A.2d 282, 291-92 (1977), the court stated:

> "The more general view, supported directly or inferentially by a decided majority of cases, is that in fixing damages for loss of past earnings or for impairment of future earning capacity because of personal injuries, the income tax consequences of the injury and award should not be taken into consideration. * * * We think that Maryland should be in accord with the majority view. Without distinguishing whether accrued or prospective, the award of damages should be based upon the plaintiff's gross earnings or earning capacity and should not be reduced because of any income tax savings which may result to the plaintiff from the fact that the damages will be exempt from income tax.
>
> "Based upon appellant's argument as to the availability of information about tax consequences, it seems to have concluded that the only persuasive reason for exclusion of tax consequences was that given by some courts, i.e., that the amount of one's future income tax liability is too conjectural or speculative a factor. . . . And we agree that future tax liability is conjectural to a large extent; however, far more persuasive to us is the fact that the matter is extraneous to the issues being tried. Taxes are strictly between plaintiff as taxpayer and the government as collector, and are of no legitimate concern of the defendants. . . . Although many defendants contend that because such recoveries are not taxable, a windfall is thus provided injured plaintiffs, that argument has a reverse effect. If an award were decreased by estimated taxes, the windfall would be one for the defendant, who has far less claim to it than the wage earner. The tax exemption was intended by Congress to benefit the injured party, not the wrongdoer."

In *Seely v. McEvers*, 115 Ariz. 171, 564 P.2d 394, 397 (Ariz. App. 1977), the court stated:

> "Although courts are divided on this question, the majority view appears to be that income tax consequences should not be taken into consideration in arriving at damages for loss of future earnings or for impairment of future earning capacity. Rather the award of damages should be based upon a plaintiff's gross earnings. The courts have generally reasoned that the amount of taxes is too conjectural and would not only unduly complicate and confuse the damages issue but overshadow the basic issue of liability. . . .
>
> "We adopt the majority rule and hold that gross pay and not net or 'take home' pay is the proper basis for computing loss of future earnings, and that evidence of income taxes or deductions should not be allowed for the purpose of reducing the amount of damages."

In *McGee v. Burlington Northern, Inc.*, ... Mont. ....., 571 P.2d 784, 790-91 (1977), the court held that an instruction concerning the impact of income taxes on the damage award was properly refused, stating:

> "We reaffirm our prior holding that future income tax liability is an improper consideration in formulating an award for loss of future earnings."

And in *Rediker v. Chicago, R.I. & P. R.R.*, 1 Kan. App. 2d 581, 571 P.2d 70, 76 (1977) (review by Kansas Supreme Court denied), *writ of cert. dismissed*, 435 U.S. 982, 99 S.Ct. 1635 (1978), the court stated:

> "Appellant next complains of the trial court's refusal to permit cross-examination of appellee's actuarial witness concerning the impact of income taxation upon his computation as to the amount of appellee's future earnings. The matter of income taxes has arisen in personal injury suits in two ways: Should future taxes be deduced from future wages in determining damages from the deprivation of future earnings, or should a jury be told the fact that an award of damages is not subject to income tax? Many jurisdictions, including our own, have dealt with the issue. The vast majority holds that a jury should not be told of this exemption, ruling either that income tax consequences cannot be considered or that cautionary instructions should not be given concerning nontaxability of the award. See Annot.: Damages—Considering Income Taxes, 63 A.L.R. 2d 1393, and Later Case Service. Reasons given include:
>
> "(1) Income tax liability or saving is a matter not pertinent to the damages issue, being a matter of concern between the plaintiff and the taxing authority.
>
> "(2) The amount of income tax which might become due on one's prospective earnings in future years is too conjectural to be considered in fixing damages.
>
> "(3) To admit income tax matter into a lawsuit for damages would be unduly complicated and confusing.
>
> "(4) If the jury were to mitigate damages by reason of income tax exemption, legislative intent to give the injured party a tax benefit would be nullified.

> "The matter was thoroughly explored in *Spencer v. Eby Construction Co.*, 186 Kan. 345, 350 P.2d 18. In concluding that in a personal injury action the incidence of federal or state income taxation is not a proper factor to be considered by the jury in making an award of damages (Syl. par. 1) the court took into account all the reasons mentioned above. Appellant's assertion of error cannot be sustained."

Defendant argues that, in the event this Court should not allow the deduction of projected future income taxes in *all* cases, at least it should adopt the *McWeeney* rule and allow such deduction when the projected future taxable income of decedent falls above the "lower or middle" ranges. Even the adoption of the *McWeeney* rule would require affirmance here. Decedent's projected earnings at time of trial of approximately $16,000 hardly place him above the "lower or middle" income range. And as to future projected increases, it is a fair assumption that these increases will parallel those of all other wage earners and that future tax brackets will be similarly adjusted, so that decedent's future wages would *always* be within the lower or middle ranges.

We submit, however, that when the benefit to defendant of taking into account future income taxation—a benefit whose equities are weak—is balanced against the practical, administrative and equitable factors discussed above, the benefit to defendant is not justified by the burdens, costs and inequities it would produce. Those burdens, costs and inequities so far outweigh the questionable equity for which defendant argues as to require its rejection in all cases.

CONCLUSION

For the foregoing reasons, amicus curiae The Association of Trial Lawyers of America respectfully submits that the judgment should be affirmed.

Respectfully submitted,

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